IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-6438

EWELL SCOTT, On Behalf of Himself And All Others Similarly Situated,

PETITIONERS,

vs.

KENTUCKY PAROLE BOARD, LUCILLE ROBUCK, Chairman of the Kentucky Parole Board, CHARLES WILLIAMSON, NEWT MC CRAVEY, CARL OWSLEY, and GLEN WADE, Members of the Kentucky Parole Board,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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* * * * * * *

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner Ewell Scott, on behalf of himself and the class he represents, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 15, 1975, petition for rehearing denied and mandate entered on April 2, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is set out in the Appendix hereto on p 1A . The Memorandum Opinion of the District Court is unreported and is set out in the Appendix hereto on p. 3A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 15, 1975, and a timely petition for rehearing and suggestion of the appropriateness of a rehearing in banc was denied on April 2, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the minimum guarantee of procedural due process safeguarded by the Fourteenth Amendment apply to state parole release proceedings?

2. If the Fourteenth Amendment's guarantee of procedural due process does apply to state parole release proceedings, what are the minimum procedures that must be employed by a state parole board in conducting such proceedings?

STATUTORY PROVISIONS INVOLVED

Ky. Rev. Stat. §439.330:

> (1) The board shall:
> (a) Study the case histories of persons eligible for parole, and deliberate on that record;
> (b) Conduct hearings on the desirability of granting parole;
> (c) Impose upon the parolee or conditional releasee such conditions as it sees fit:
> (d) Order the granting of parole;
> (e) Issue warrants for persons charged with violations of parole and conditional release and conduct hearings on such charges;
> (f) Determine the period of supervision for parolees and conditional releasees, which period may be subject to extension or reduction after recommendation of the division is received and considered;
> (g) Grant final discharge to parolees and conditional releasees.
>
> (2) The board shall adopt an official seal of which the courts shall take judicial notice.
>
> (3) The orders of the board shall not be reviewable except as to compliance with the terms of KRS 439.250 to 439.560.

(4) The board shall keep a record of its acts, shall notify each institution of its decisions relating to the persons who are or have been confined therein, and shall submit to the governor a report with statistical and other data of its work at the close of each fiscal year.

Ky. Rev. Stat. §439.340:

(1) The board may release on parole such persons confined in any adult state penal or correctional institution of Kentucky as are eligible for parole. All paroles shall issue upon order of the board duly adopted. As soon as practicable after his admission and at such intervals thereafter as it may determine, the Division of Institutions shall obtain all pertinent information regarding each prisoner, except those not eligible for parole. Such information shall include his criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made. The Division of Probation and Parole shall furnish the circumstances of his offense and his previous social history to the institution and the board. The Division of Institutions shall prepare a report on such information as it obtains. It shall be the duty of the Division of Probation and Parole to supplement this report with such material as the board may request and submit such report to the board.

(2) Before granting the parole of any prisoner, the board shall consider the pertinent information regarding the prisoner and shall have him appear before it, or one or more members for interview and hearing. A parole shall be ordered only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes he is able and willing to fulfill the obligations of a law abiding citizen.

(3) The board shall adopt such rules or regulations as it may deem proper or necessary with respect to the eligibility of prisoners for parole, the conduct of parole hearings, or conditions to be imposed upon parolees. Regulations governing the eligibility of prisoners for parole shall be in accordance with prevailing ideas of correction and reform.

(4) Whenever an order for parole is issued it shall recite the conditions thereof.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constit. amend XIV: "[N]or shall any State deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

This action was instituted pursuant to 42 U.S.C. §1983 in the United States District Court for the Eastern District of Kentucky by Ewell Scott and Calvin Bell[1] as a class action on behalf of all inmates incarcerated in the Kentucky penal system who are subject to the jurisdiction of the Kentucky Parole Board.[2] The action challenged the constitutionality of the absence of minimal procedural safeguards in parole release proceedings conducted by the Kentucky Parole Board (hereinafter referred to as the Board), which has the authority, pursuant to Ky. Rev. Stat. §§439.330 and 439.340, to release on parole all eligible inmates in the Kentucky penal system. The Complaint (a copy of which is set out in the attached Appendix on p. 7A), seeking declaratory and injunctive relief, was tendered along with a motion for leave to proceed in forma pauperis and properly authenticated affidavits.

The Complaint (App. pp. 7A) alleged a number of constitutional deficiencies in the practices and procedures employed by the Board in the conduct of parole release proceedings. The most prominent of these included:

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[1] Since this action was filed, the plaintiff Bell has been released from custody. Plaintiff Scott is still incarcerated.

[2] A small number of inmates are permanently ineligible for parole pursuant to Ky. Rev. Stat. §435.090 and are not included in the class on behalf of whom this action was brought.

(1) The parole applicant is denied access to any of the material considered by the Board in reaching its decision.

(2) At the parole hearing -- which often lasts only minutes -- the applicant is not afforded a meaningful opportunity to present evidence in his behalf.

(3) At no time throughout the proceedings is an applicant permitted to be represented by counsel or by a lay representative or advocate.

(4) The unsuccessful applicant neither is provided a written statement of reasons explaining the basis for denial nor is informed of the criteria, if any, used by the Board in reaching its decision or of the conditions or requirements which, if fulfilled, would allow the applicant to be favorably considered by the Board.

The Complaint also set forth the particular circumstances surrounding the last interviews afforded the named plaintiffs by the Board. Petitioner Scott was last given a hearing by the Board in November, 1973. Consideration of his parole was governed by the practices and procedures described above. Most of the discussion at the interview concerned the facts surrounding his conviction. Despite a near perfect institutional record, the Board, after brief deliberation, informed Scott that he needed "more time to get together" and gave him a twenty-four month setback.

In a memorandum opinion dated March 15, 1974, the District Court -- without the benefit of any responsive pleadings by the defendants -- overruled the plaintiffs' motion for leave to proceed in forma pauperis and dismissed the action. The opinion, citing earlier federal cases that had rejected similar challenges, concluded that the denial of parole "wreaks no such 'grevious loss'" as to activate the minimum procedural safeguards of the Fourteenth Amendment. The plaintiffs duly filed a motion for leave to appeal in forma

pauperis, but this Motion was denied by the District Court on the ground that the appeal was not taken in good faith.

Thereafter, the plaintiffs requested leave to appeal in forma pauperis from the United States Court of Appeals for the Sixth Circuit, and this motion was granted on July 25, 1974. Following full briefing and argument, the Sixth Circuit, on January 15, 1975, affirmed the judgment of the District Court. In its opinion, the Sixth Circuit, after reviewing the applicable facts, concluded that "the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution." The plaintiffs filed a petition for rehearing and suggestion of the appropriateness of a rehearing in banc, citing very recent decisions by the United States Court of Appeals for the District of Columbia and the United States Court of Appeals for the Fourth Circuit ruling that the minimum procedural safeguards of the due process clause of the Fifth and Fourteenth Amendments do apply in parole release proceedings. On April 2, 1975, the Sixth Circuit denied the petition without comment. This petition seeks to review the rejection by the Sixth Circuit of the applicability of the due process clause of the Fourteenth Amendment to state parole release proceedings.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS SQUARELY IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON AN IMPORTANT QUESTION AFFECTING THE ADMINISTRATION OF CORRECTIONAL JUSTICE NATIONWIDE.

Every state now has some system for the early release of inmates through parole. Although the details may differ, the process is generally the same as that employed by the Kentucky Board in the present case. The process is closed,

few formal procedures, if any, govern the proceedings, and the discretion of the parole board throughout the entire process is virtually unlimited. In many cases, as here, the parole applicant is left in the dark as to the reasons for denial and what standards or criteria, if any, the parole board used in making its decision, a penultimate one for the inmate. See generally Kastenmeier & Eglit, Parole Release Decisionmaking: Rehabilitation, Expertise, and the Demise of Mythology, 22 Am. U.L. Rev. 477 (1973).

Prior to Morrissey v. Brewer, 408 U.S. 471 (1972), courts were reluctant to interfere in parole proceedings, terming parole a privilege not entitled to constitutional protection. The decision in Morrissey, which demolished the right-privilege distinction in defining a parolee's constitutional rights, dramatically altered the hands-off posture assumed by the federal judiciary and led to a wave of decisions on the precise issues raised in the case at bar. At first, the cases on this issue were split. For cases requiring minimum due process protection in parole release proceedings, both federal and state, see Cooley v. Sigler, 381 F. Supp. 441 (D. Minn. 1974); Craft v. Attorney General of the United States, 379 F. Supp. 539 (M.D. Pa. 1974); Candarini v. Attorney General of the United States, 369 F. Supp. 1132 (E.D. N.Y. 1974); Johnson v. Heggie, 362 F. Supp. 851 (D. Colo. 1973); Solari v. Vincent, 77 Misc. 2d 357, 353 N.Y.S. 2d 639 (1974); In re Sturm, 11 Cal. 3d 258, 521 P.2d 97 (1974); Monks v. Board of Parole, 277 A.2d 193 (N.J. 1971). For cases rejecting all claims of due process rights in parole release proceedings, both federal and state, see Wiley v. United States Board of Parole, 380 F. Supp. 1194 (M.D. Pa. 1974); Rankins v. Christian, 376 F. Supp. 1258 (D.V.I. 1974); Ornitz v. Robuck, 366 F. Supp. 183 (E.D. Ky. 1973); Baradale v. United States Board of Paroles and Pardons, 362 F. Supp. 338 (M.D. Pa. 1973); Harrison v. Robuck, 508

S.W.2d 767 (Ky. 1974).

But, in the few years it took for these cases to make their way up the appellate ladder, the weight of authority decidely turned in favor of extending due process protection to parole release proceedings. Three recent cases, reaching results diametrically opposed to the Sixth Circuit in the present case, illustrate the better reasoned decisions on this issue.

In United States ex rel. Johnson v. Chairman of New York Board of Parole, 500 F.2d 925 (2d Cir.), vacated on mootness grounds sub nom. Regan v. Johnson, 95 S. Ct. 488 (1974), the Second Circuit, facing the same issue as presented in this petition, held that the due process clause of the Fourteenth Amendment requires the New York State Board of Parole to provide inmates of state prison facilities with a written statement of reasons when release on parole is denied. At the threshhold, the court distinguished the prior Second Circuit case of Menechino v. Oswald, 430 F.2d 403 (2d. Cir. 1970),[3] on two grounds: (1) In Menechino, the plaintiff had primarily sought the right to counsel and to cross-examine witnesses -- rather than the right to a written statement of reasons. No consideration therefore was given to partial relief; and (2) Menechino was decided prior to Morrissey v. Brewer, supra, which "rejected the concept that due process might be denied in parole proceedings on the ground that parole was a 'privilege' rather than a 'right.'" 500 F.2d at 927.

With parole treated as an "interest" entitled to due process protection, the Court found that:

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[3] Menechino was one of the cases heavily relied on by the District Court here.

> "[a] prisoner's interest in prospective parole, or 'conditional entitlement', must be treated in like fashion. To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional release versus incarceration". Id. at 928.

Strengthening the Court's view was the fact that in New York, as in Kentucky, most inmates could expect parole. Therefore, "[f]or him, with such a large stake, the Board's determination represents one of the most critical decisions that can affect his life and liberty". Id.

Having decided that due process applies to parole release proceeding, the Court turned to the question of what process is due. It held that an inmate who had been denied parole must be given a statement of reasons for the denial that would be sufficient to enable a reviewing body to determine whether parole had been denied for an impermissible reason or for no reason at all and that would inform the inmate both of the grounds for the decision and the essential facts upon which the parole board's inferences were made. A reasons requirement, the court observed, would not only promote rehabilitation by letting the inmate know where he stood, but also enhance the integrity of the decision-making process of the parole board.

In Bradford v. Weinstein, No. 73-1751 (4th Cir. Nov. 22, 1974), rev'g 357 F. Supp. 1227 (E.D. N.C. 1973), the Fourth Circuit reached the same conclusion as the Second on the question of the applicability of due process protections to parole release proceedings:

> "We are of the view that plaintiffs' right to consideration for parole eligibility is, at least, an aspect of liberty to which the protection of the due process clause extends. Indeed, in North Carolina, which guarantees to each prisoner with respect to parole 'a review and consideration of its case on the merits', the right may be one of 'property'." Slip Opin. at 9.

Calling the parole release situation the converse of the in-prison disciplinary situation in Wolff v. McDonnell, 418 U.S. 539 (1974), the court discerned no distinction in the two circumstances as far as the applicability of due process protection was concerned. "We think it would be a grievous loss for a prisoner by reason of a completely ex parte proceeding, and the resulting increased opportunity for committing error, to be denied parole and required to serve more of his term because the attention of the parole board was not called to data tending to indicate that parole should be granted, or for a prisoner whose incarceration has as its ultimate objective the prisoner's rehabilitation to fail to know, let alone understand, why parole is denied him and learn what changes in attitudes, habits, and the like will be required if he is ever to be successful in obtaining parole...." Slip Opin. at 11. Having reached the conclusion that the Sixth Circuit here rejected, the court remanded the case for further development of how much process is due.

In Childs v. United States Board of Parole, No. 74-1276 (D.C. Cir. Dec. 19, 1974), aff'g 371 F. Supp. 1246 (D.D.C. 1973), the United States Court of Appeals for the District of Columbia joined with the Second and Fourth Circuits in holding that "the parole decision must be guided by minimal standards of procedural due process". Slip Opin. at 16. Relying on Morrisey, Wolff, and the trend of recent decisions on this issue and distinguishing the only full-blown post-Morrissey adverse Court of Appeals decision on this question, Scarpa v. United States Board of Parole, 477 F.2d 278 (5th Cir.), vacated on mootness grounds 414 U.S. 809 (1973).[4]

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[4] In a recent suit on this issue, the Fifth Circuit accorded no precedential value to Scarpa. Ridley v. McCall, 496 F.2d 213 (5th Cir. 1974). See also Cook v. Whiteside, 505 F.2d 32 (5th Cir. 1974).

the Court ruled that the protection of an individual's interest in liberty from possible arbitrary governmental deprivation demanded that due process apply to parole release proceedings. With this basic ruling behind it, the Court proceeded to examine the minimal procedures that must infuse the parole release process.

Flying in the face of these decisions and others,[5] the Sixth Circuit by its decision below, has refused to bring the rule of law into state parole release proceedings. As a result of this decision, the Kentucky Parole Board remains free to exercise the unbridled discretion it has enjoyed in the past with no insurance for the inmate against arbitrary and mistaken decisions. The decision is directly contrary to the rulings of other Circuit Courts of Appeal and, as a matter of pressing importance in the orderly administration of correctional justice nationwide, should be reviewed by this Court.

II.

THE DECISION BELOW CLEARLY RUNS COUNTER TO THE TREND OF RECENT CASES OF THIS COURT EXTENDING DUE PROCESS PROTECTIONS.

In affirming the decision of the District Court, the Sixth Circuit put itself on record as approving the proposition that the denial of parole does not "wreak a grievous loss of liberty" sufficient to bring into play the Fourteenth Amendment's guarantee of procedural due process. In so holding,

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[5] See Mower v. Britton, 504 F.2d 396 (10th Cir. 1974); King v. United States, 492 F.2d 1237 (7th Cir. 1974).

it sided with the reasoning of a handful of lower federal court cases, most of which antedated Morrissey v. Brewer, 408 U.S. 471 (1972). In light of Morrissey and subsequent cases, the support for the Sixth Circuit's position is gravely eroded, if not nonexistent.

In Morrissey, this Court recognized that release on parole is not a "privilege" subject to revocation at the will of the state, but, to the contrary, an important interest deserving constitutional protection:

> "During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo. L.J. 705 (1968). Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.
>
> ....
>
> We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations. As MR. JUSTICE BLACKMUN has written recently, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege"'. Graham v. Richardson, 403 U.S. 365, 374 (1971). Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelley, 397 U.S. 254, 263 (1970). The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment. Fuentes v. Shevin, 407 U.S. 67 (1972)." Id. at 477, 481.

In recognizing the real value of this interest to the parolee, the Court put parole on a higher plane for constitutional purposes than lower courts had uniformly viewed it in the past and "it is fair to say that the slate has been wiped all but clean." Childs v. United States Board of Parole, 371 F. Supp. 1246, 1247 (D.D.C. 1973).

In the recent decisions of the District of Columbia, Second and Fourth Circuits discussed above, the reasoning in Morrissey played a major role in the courts' rulings. In Childs v. United States Board of Parole, supra, the D.C. Circuit used Morrissey as the fundamental framework for its decision. Asserting that an aggrieved parole "applicant is deprived of the valuable features of conditional liberty described by the Court" in Morrissey and recognizing that "[t]he Board holds the key to the lock of the prison," Slip Opin. at 15, the Court, taking the logical step dictated by Morrissey, extended the protection of the due process clause to the administration of parole release. In United States ex rel. Johnson v. Chairman of New York Board of Parole, supra, Morrissey also served as the foundation of the Second Circuit's decision. "In our view Morrissey not only cast grave doubt upon [prior Courts of Appeals decisions on this issue] but, more important for present purposes, rejected the concept that due process might be denied in parole proceedings on the ground that parole was a 'privilege' rather than a 'right'." Id. at 927. Likewise, in Bradford v. Weinstein, the Fourth Circuit hinged its reasoning on the pivotal holding in Morrissey.

In addition to Morrissey, both Childs and Bradford looked to the recent decision of this Court in Wolff v. McDonnell, supra, extending due process protection to in-prison disciplinary proceedings, as support for their holdings. In Childs, the court noted:

> "Just as the Court found in Wolff that the State, having created the valuable right to good time, must act according to constitutional safeguards when it withdraws the right, so here, where the Federal government had made parole an integral part of the penological system, I believe it is also essential that authority to deny parole not be arbitrarily exercised. While the applicant's status is not changed by such a denial in the sense that he remains in the same custodial situation as before, the necessity of due process to support the denial is not therefore obviated, for the status remains the same because of a Board determination which if favorable would have changed the status to one of greater liberty." Slip Opin. at 20.

In Bradford, the Fourth Circuit also viewed its result as logically flowing from the holding in Wolff:

> "The case is really the converse of Wolff. There, one who was confined is afforded the right of consideration of partial release from restraint and the privilege of partial release. The first is a right not to be restrained; the second, the privilege of release from restraint. The distinction is without a difference, because the historical dichotomy of protection, depending upon whether something is a right or privilege has now been eradicated." Slip Opin. at 10. Accord, Craft v. Attorney General of United States, 379 F. Supp. 538 (M.D. Pa. 1974).

By finding no constitutional deprivation in the instant case, the Sixth Circuit markedly departed from the principles enunciated in Morrissey and Wolff.[7] This Court should grant certiorari if only to erase any misimpression the decision below leaves with regard to the proper scope of these decisions.

Not only does the decision below improperly limit the

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[7] Buttressed by Morrissey, a line of cases has developed requiring due process in the parole recission situation, where a parole board rescinds a previously granted release date based on new adverse evidence. In principle, these cases are indistinguishable from the theory urged by the petitioners in the case at bar. See In re Prewitt, 8 Cal. 3d 470, 503 P.2d 1326, 105 Cal. Rptr. 318 (1972); Hamm v. Regan, 43 App. Div. 2d 344, 351 N.Y.S. 2d 742 (1974); King v. Genekas, 3 Pris. L. Rptr. 119 (Mass. Super. Ct. Feb. 26, 1974); Means v. Wainwright, 229 So.2d 577 (Fla. 1974), cert. denied 95 S. Ct. 796 (1975); but see Sexton v. Wise, 494 F.2d 1176 (5th Cir. 1974).

scope of Morrissey and Wolff, but it also runs counter to the distinct recent trend of other decisions of this Court extending due process protections. Since Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (due process before garnishment of wages), this Court, in an almost unbroken line of cases, has extended the safeguards of the due process clause to a host of situations where liberty and property interests formerly exempt from constitutional protection were threatened by unchecked governmental action. See, e.g., Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process may require counsel in probation revocation hearing); Fuentes v. Shevin, 407 U.S. 67 (1972) (due process before state-assisted repossession); Bell v. Burson, 402 U.S. 535 (1971) (due process before suspension of driver's license); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (due process before publicly advertised right to purchase liquor); Goldberg v. Kelly, 397 U.S. 254 (1969) (due process before termination of welfare benefits). Most recently, in Goss v. Lopez, 95 S. Ct. 729 (1975),[8] the Court brought public school suspensions under the protective canopy of the due process clause. In analyzing the entitlement to a public education asserted by the students, the Court found that both property and liberty interests were at stake in suspensions from school. The property interest was grounded in the state's extension of the right to an education to all children, whereas the liberty interest was rooted in the damaging consequences potentially flowing from even a ten-day suspension. Having established the existence of these separate interests, the Court concluded:

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[8] See also North Georgia Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975).

"Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary." Id. at 737.

The analysis employed in Goss, which was distilled from a number of prior cases interpreting the applicability of the due process clause, is directly relevant to the present case. By statute, Kentucky has established the right to parole consideration, an undeniably significant event in the life of a prisoner. Similarly, the denial of parole is a direct impingement on a prisoner's liberty, depriving him of conditional release, and may entail other adverse collateral consequences. With both property and liberty interests at stake -- interests that can be viewed as of much greater moment than those involved in a ten day school suspension -- the denial of parole should, a fortiori, qualify for due process protection.

Bucking the well settled principles articulated in Goss and prior cases, the decision below immunizes an important state agency from the salutary procedures dictated by the due process clause. Protected from review or scrutiny of any kind, the Kentucky Parole Board -- unlike the prison administrators in Wolff, the school personnel in Goss, or the transportation officials in Bell, among others - is left free to decide the fate of prisoners without any of the minimal protection required by due process. This result contradicts the letter and spirit of the overwhelming number of decisions of this Court extending due process protection and should be reviewed for this reason alone.

III.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDICES

FILED

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT JAN 15 1975

JOHN P. HEHMAN, Clerk

CALVIN BELL and EWELL SCOTT,

Plaintiffs-Appellants

V.

O R D E R

KENTUCKY PAROLE BOARD, LUCILLE ROBUCK, Chairman of the Kentucky Parole Board, CHARLES WILLIAMSON, NEWT McCRAVEY, CARL OWSLEY and GLEN WADE, Members of the Kentucky Parole Board,

Defendants-Appellees

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges

Plaintiffs Calvin Bell and Ewell Scott, both incarcerated in the Kentucky State Penitentiary and both having been denied parole release following hearings before the Kentucky Parole Board, filed this class action in the United States District Court for the Eastern District of Kentucky, seeking a determination that parole release procedures of the Kentucky Parole Board failed to conform to minimum guarantees under the due process clause of the Fourteenth Amendment to the United States Constitution. Their complaint sought as well the promulgation of detailed regulations to govern parole release hearings which would comport with their views of due process requirements. From a dismissal of their complaint by the district court, the plaintiffs appeal.

The case was submitted to this court upon the record and the briefs and oral arguments of counsel. Upon consideration thereof, it appearing that the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution and that therefore the district court did not err in dismissing the complaint,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman

Clerk

FILED
MARCH 15, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CALVIN BELL, EWELL SCOTT,
Individually and on behalf
of all other persons similarly
situated — PLAINTIFFS

v.

KENTUCKY PAROLE BOARD, ET AL — DEFENDANTS

MEMORANDUM

The plaintiffs seek to proceed in forma pauperis in this civil rights class action attacking procedural denials attendant to the operation of the Kentucky conditional release system. The tendered complaint alleges that the parole board utilizes unarticulated standards in defiance of state law, K.R.S. 439.340, and that the release hearings improperly deny (1) an adjudicatory proceeding; (2) representation by an attorney or lay counsel; (3) access to personal files in the possession of the board; (4) advance notification of the issues to be considered; (5) an opportunity to present evidence and cross-examine witnesses; (6) a transcript or summary of evidence; (7) findings of fact or statement of reasons for denial of parole. Analysis of these assertions reveals no deprivation cognizable by the federal courts.

The procedural dictates of the Due Process Clause are activated only upon the deprivation of a right or entitlement of constitutional magnitude. Although the loss of freedom resulting from revocation of parole merits due process applicability, Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972), the denial of parole wreaks no such "grievous loss". Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

> "(A) parole revocation proceeding differs from a review by a parole board to determine whether an inmate should be paroled initially. In the former proceeding, the determination is whether the conditional freedom of the parolee should be terminated because of an alleged violation of the conditions of his parole. In a review to decide whether parole should be granted, the determination is whether an inmate is a suitable prospect for return to society.
>
> This Court is of the opinion that the Due Process Clause does not apply in procedures designed to determine suitability for parole."[1]

While courts will on occasion intervene to correct abuses in the nation's parole system, Morrissey v. Brewer, supra, the nature of this "practical and troublesome area"[2] demands that

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[1] Bradford v. Weinstein., E.D. N.C., 357 F. Supp. 1127, 1131 (1973). Accord, Ganz v. Bensinger, 7th Cir., 480 F.2d 88 (1973); Menechino v. Oswald, 2d Cir., 430 F.2d 403 (1970), cert. denied 400 U.S. 1023 (1971); Barradale v. United States Board of Paroles and Pardons, M.D. Pa., 362 F. Supp. 338 (1973); Ott v. Ciccone, W.D. Mo., 326 F. Supp. 609 (1970).

[2] McGinnis v. Royster, 410 U.S. 263, 270 (1973).

the states be left free to develop correctional remedies unhampered by pervasive judicial interference in the mechanics of conditional release; the numerous factors involved in the assessment of an inmate's suitability for release demands a flexibility unattainable in a formal adjudicatory hearing. "The Authority. . . is and must be free to weigh all the tangible and intangible factors which determine whether a particular person is ready to return to society before his maximum term has been served."[3] This consideration has led to judicial approval of parole hearings conducted without providing legal representation[4]; a transcript or summary of evidence[5]; access to prison files[6]; notice of issues[7]; the opportunity to present evidence and cross-examine adverse witnesses[8]; and reasons for denial of parole.[9] Similarly, the failure to promulgate standards, while conceivably in derogation of state law, is not a concern redressable in this forum; "(i)f the rule were otherwise, every erroneous decision on state law matters would come before the federal court as a constitutional question."[10]

An order will be entered overruling the motion for leave to proceed in forma pauperis and dismissing the action.

March 15, 1974 Mac Swinford, Judge

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3 Dorado v. Kerr, 9th Cir., 454 F.2d 892, 897 (1972), cert. denied 409 U.S. 934 (1972); Barradale v. United States Board of Paroles and Pardons, supra note 1; Ott v. Ciccone, supra note 1.

4 Ganz v. Bensinger, supra note 1; Dorado v. Kerr, supra note 2; Barnes v. United States, 8th Cir., 445 F.2d 260 (1971); Buchanan v. Clark, 5th Cir., 446 F.2d 1379 (1971), cert. denied 404 U.S. 979 (1971); Menechino v. Oswald, supra note 1; Schawartzberg v. United States Board of Parole, 10th Cir., 339 F.2d 297 (1968).

5 Dorado v. Kerr, supra note 2; Menechino v. Oswald, supra note 1.

6 Dorado v. Kerr, supra note 2; Bradford v. Weinstein, supra note 1.

7 Menechino v. Oswald, supra note 1; Barradale v. United States Board of Paroles and Pardons, supra note 1; Ott v. Ciccono, supra note 1.

8 Tarlton v. Clark, 5th Cir., 441 F.2d 384 (1971), cert. denied 403 U.S. 934 (1971); Menechino v. Oswald, supra note 1.

9 Dorado v. Kerr, supra note 2; Mosley v. Ashby, 3d Cir., 459 F.2d 477 (1972); Menechino v. Oswald, supra note 1.

10 Sims v. Parke Davis & Co., E.D. Mich., 334 F. Supp 774, 793 (1971), aff'd 6th Cir., 453 F.2d 1259 (1971), cert. denied 405 U.S. 978 (1972); Mosley v. Ashby, supra note 8; United States ex rel Campbell v. Pate, 7th Cir., 401 F.2d 55 (1968); Draper v. Rhay, 9th Cir., 315 F.2d 193 (1963); cert. denied 375 U.S. 915 (1963).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

CALVIN BELL and EWELL SCOTT, Individually and on behalf of all other persons similarly situated,
PLAINTIFFS,

vs. Civil Action No._____

KENTUCKY PAROLE BOARD, LUCILLE ROBUCK, Chairman of the Kentucky Parole Board, CHARLES WILLIAMSON, NEWT MC CRAVEY, CARL OWSLEY, and GLEN WADE, Members of the Kentucky Parole Board,
DEFENDANTS.

COMPLAINT

The plaintiffs, for their complaint, allege as follows:

1. The jurisdiction of this Court arises under Title 28 U.S.C, §§1343(3)(4), 2201, 2202. This is a proceeding in equity pursuant to 42 U.S.C. §1983 to redress the violation of rights guaranteed to the plaintiffs by the Constitution of the United States, in particular the due process clause of the Fourteenth Amendment thereto.

2. Plaintiff CALVIN BELL is a citizen of the United States and the Commonwealth of Kentucky, presently incarcerated in the Kentucky State Penitentiary under a sentence of life imprisonment. Plaintiff EWELL SCOTT is a citizen of the United States and the Commonwealth of Kentucky, presently incarcerated in the Kentucky State Penitentiary under a sentence of twelve years

imprisonment.

3. Pursuant to FRCP 23, plaintiffs sue on behalf of themselves and on behalf of all persons similarly situated, to-wit, inmates incarcerated in prisons and other penal institutions in the state of Kentucky who presently or in the future will be subject to the jurisdiction of the KENTUCKY PAROLE BOARD, and who have been, are presently, or in the future will be brought before the KENTUCKY PAROLE BOARD for a parole release proceeding. These persons constitute a class so numerous as to make it impracticable to bring them before this Court. There are common questions of law and of fact affecting the rights of such persons to due process of law, and common relief is sought. The claims of the plaintiffs are typical of the claims of the class. These defendants have acted and intend to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole. The plaintiffs will fairly and adequately represent the interests of the class.

4. Defendant KENTUCKY PAROLE BOARD is an independent agency of the state of Kentucky established pursuant to K.R.S. 439.320, and charged by law with the authority to release a prisoner on parole and to conduct hearings to determine whether parole should be granted. Defendant LUCILLE ROBUCK is the Chairman of the Kentucky Parole Board, and defendants CHARLES WILLIAMSON, NEWT MC CRAVEY, CARL OWSLEY and GLEN WADE are members of the Kentucky Parole Board.

5. Pursuant to the provisions of K.R.S. 439.330, 439.340, the Board has authority to release on parole all inmates confined

in Kentucky prisons or other penal institutions who are eligible for parole. The Board is directed to adopt rules and regulations with respect to the eligibility of inmates for parole, such regulations to be "in accordance with prevailing ideas of correction and reform." To the best of plaintiffs' knowledge and belief, no such rules and regulations have been promulgated by the Board. Alternatively, if such rules and regulations have been promulgated, plaintiffs and the class they represent, to-wit, inmates incarcerated in prisons and other penal institutions in the state of Kentucky, have not been informed of the existence of such rules and regulations and are not aware of their contents.

6. Pursuant to the provisions described above, the Board is directed to study the case histories of persons eligible for parole, to conduct hearings on the desirability of granting parole and to obtain all pertinent information regarding each inmate eligible for parole. An interview of the inmate before one or more of the Board members is also required. The Board is further directed to adopt rules and regulations for the conduct of parole hearings. To the best of plaintiffs' knowledge and belief, no such rules and regulations have been promulgated by the Board. Alternatively, if such rules and regulations have been promulgated, plaintiffs and the class they represent, to-wit, inmates incarcerated in prisons and other penal institutions in the state of Kentucky, have not been informed of the existence of such rules and are not aware of their contents.

7. The Board and its members gather virtually no information about the inmates themselves. In studying the case histories of inmates eligible for parole, they rely entirely upon information contained in the file on the inmate, which is maintained by the

prison or other penal institution in which the inmate is incarcerated or by the Kentucky Department of Corrections. They occasionally supplement this file with information that outside sources or third persons may choose to furnish them. There is no organized way in which information is excluded or included in the file, organized in the file, or tested for relevancy, accuracy, reliability, bias or prejudice. The information contained in the file is thus haphazardly gathered, arbitrary in the inclusion and exclusion of facts, and unscientific and irrational with respect to intelligent decision-making. The inmate has no access to his file, is not aware of its contents, has no knowledge of what material in the file is being considered by the Board in making its decision, and has no opportunity to rebut or explain adverse information in the file.

8. The inmate is notified in advance of the date of his interview with a member or members of the Parole Board. He is not notified of what issues or information the Board will be considering in making the decision on his parole. In the absence of such knowledge he does not have a meaningful opportunity to prepare a presentation for consideration by the Board. At the interview before the Board, the inmate is permitted to speak and ask questions, but is not permitted to present evidence and arguments to justify his release. He is not permitted to challenge, cross-examine, or interpret the evidence that will be used by the Board in its decision to grant or deny parole. He is not permitted to be represented by counsel or by lay spokesmen or advocate, or in any manner whatsoever when his parole is being considered by the Board.

9. No record, transcript, or summary of the testimony and questions at the interview is prepared and maintained. The Board announces its decision orally, often at the conclusion of the interview, and generally with only minimal deliberation. Occasionally, oral reasons for the decision are given, but frequently no reasons at all are given. Written reasons are never given by the Board, and there is no statement of the factual basis for the decision, or of the rules, standards or criteria used in making the decision.

10. At no time, either before or after the decision, is an inmate advised by the Board as to what rules, standards or criteria will be used by the Board in determining whether to grant or deny parole, nor is he advised as to how he must conform his conduct, or as to what is expected of him, so that he may receive parole at a future date.

11. Plaintiff BELL was last given an interview before the Board in March, 1973. Consideration of his parole took place under the conditions described in paragraphs 5 through 10 herein. At that time he was given an eighteen month setback and was informed orally that the prosecuting attorney of the county in which his offense was committed did not want him to be released on parole. His request to see a copy of the prosecutor's letter was denied by the Board. Presumably, he will have another interview before the Board in September, 1974.

13. Plaintiff SCOTT was last given an interview before the Board in November, 1973. Consideration of his parole took place under the conditions described in paragraphs 5 through 10 herein. Most of the discussion at the interview concerned the facts surrounding his conviction. While in prison, he had

enrolled in school and was participating in a group therapy program. He had not committed any disciplinary infraction. After very brief consideration by the Board, he was informed he should "have more time to get together" and was given a twenty-four month setback. Presumably, he will have another interview before the Board in November, 1975.

14. The practices and policies of the Kentucky Parole Board described herein deny to the plaintiffs and the class they represent due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in that they have brought about the continued deprivation of liberty of the plaintiffs and the members of the class without those procedural safeguards necessary to insure a fair and accurate determination of whether or not to grant parole. These practices and policies are violative of due process of law for the following reasons among others:

1. There is no adjudicatory-type hearing on the determination of whether to grant or to deny parole;

2. There is no opportunity for the inmate to be represented by an attorney, lay spokesman or advocate or other representative of the inmate's choosing;

3. There is no opportunity for the inmate to have access to the file that is considered by the Board or to rebut or explain adverse information in said file;

4. The inmate is not notified in advance of what issues or information the Board will be considering, and he is thus unable to prepare a proper presentation for consideration by the Board;

5. The inmate is not permitted to present evidence and arguments to justify his release on parole, nor to challenge, cross-examine or interpret the evidence that will be used by the Board in its decision to grant or deny parole;

6. No record, transcript or summary of testimony and questions at the interview is prepared and

maintained;

7. The Board does not state in writing the reasons for its decisions, and does not make a statement of the factual basis for the decision, or of the rules, standards or criteria used in making the decision.

15. Due process of law is further denied to the plaintiffs and the members of the class by the fact that the criteria, standards, norms or rules actually used by the Board in determining whether to grant or deny parole are unpublished and unarticulated and are applied in a wholly subjective, arbitrary and capricious manner. As a result of the failure of the defendants to articulate what rules, standards or criteria will be applied in the decision to grant or deny parole, plaintiffs and the members of the class do not know how they may conform their conduct to approved standards so that they may receive parole at a future date.

16. As a result of the actions described herein, the plaintiffs and the members of the class have suffered and will continue to suffer serious, immediate and irreparable injury to their constitutional rights and will continue to be incarcerated and deprived of their liberty without due process of law. The plaintiffs and the members of the class have no plain, speedy and adequate remedy at law, and the present suit is the only means of securing the relief requested.

WHEREFORE, Plaintiffs respectfully pray for the following relief:

1. That this Court advance this case on its docket, grant a hearing at the earliest practicable date and cause this case to be in every way expedited.

2. That this Court issue an Order pursuant to FRCP 23(c)(1) authorizing this action to be maintained as a class action.

3. That this Court issue a declaratory judgment to the effect that the practices and policies followed by the defendants in parole release proceedings, as described herein, are violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. That a permanent injunction be issued against the defendants herein, their attorneys, agents, employees, servants, and successors in office, directing them to take the following action:

A. To promulgate rules for the conduct of parole release proceedings which shall provide for the following:

(1) an adjudicatory-type hearing on the determination of whether to grant or deny parole;

(2) The opportunity for the inmate to be represented at such hearing by an attorney, lay spokesman or advocate or other representative of the inmate's choosing;

(3) The opportunity for the inmate to have access to his file prior to the time that said file is considered by the Board and to rebut or explain adverse information in said file;

(4) Notification to the inmate in advance of the hearing as to what issues or information the Board will consider at the hearing;

(5) The opportunity for the inmate to present evidence and arguments to justify his release on parole and to challenge, cross-examine or interpret the evidence that will be used by the Board in making its decision to grant or deny parole;

(6) The preparation and maintenance of a transcript or summary of testimony

and questions at the hearing;

(7) A statement in writing of reasons for the Board's decision to grant or deny parole and a statement of the factual basis for the decision and of the rules, standards or criteria used in making the decision;

(8) Where parole is denied, a statement of what the inmate will be required to do in order to be eligible for parole in the future.

B. To promulgate and publish for distribution to the plaintiffs and members of the class the criteria, standards, norms or rules that will be used by the Board in determining whether to grant or deny parole.

5. That the plaintiffs be awarded any and all other relief to which they or the members of their class may appear to be entitle

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Deputy Kentucky Public Defender

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6438

EWELL SCOTT, ETC.,

Petitioner

—*v.*—

KENTUCKY PAROLE BOARD, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 29, 1975
CERTIORARI GRANTED DECEMBER 15, 1975

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6438

EWELL SCOTT, ETC.,

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—*v.*—

KENTUCKY PAROLE BOARD, ET AL.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

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1.	Complaint tendered	2-15-74
2.	Motion for Leave to Proceed in Forma Pauperis	2-15-74
3.	Memorandum of Court	3-15-74
4.	Order: Motion for Leave to Proceed in Forma Pauperis overruled & case dismissed	3-15-74
5.	Notice of Appeal	7-26-74
6.	Motion to Proceed on Appeal in Forma Pauperis with Affidavits	3-28-74
7.	Order: Motion for Leave to Proceed on Appeal In Forma Pauperis denied	3-29-74
8.	Order of the Sixth Circuit Court of Appeal: Motion for Leave to Proceed On Appeal In Forma Pauperis granted	7-26-74
9.	Complaint filed	7-26-74
10.	Decision and Order of the Sixth Court	1-15-75
11.	Petition for Rehearing and Suggestion of Rehearing in Banc	1-29-75
12.	Order of Sixth Circuit Denying Petition for Rehearing and Suggestion of Rehearing in Banc	4- 2-75

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

Civil Action No. ————

[Tendered Feb. 15, 1974]

[Filed July 26, 1974]

CALVIN BELL and EWELL SCOTT, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

vs.

KENTUCKY PAROLE BOARD, LUCILLE ROBUCK, Chairman of the Kentucky Parole Board, CHARLES WILLIAMSON, NEWT MC CRAVEY, CARL OWSLEY, and GLEN WADE, Members of the Kentucky Parole Board, DEFENDANTS

COMPLAINT

The plaintiffs, for their complaint, allege as follows:

1. The jurisdiction of this Court arises under Title 28 U.S.C. §§ 1343(3) (4), 2201, 2202. This is a proceeding in equity pursuant to 42 U.S.C. § 1983 to redress the violation of rights guaranteed to the plaintiffs by the Constitution of the United States, in particular the due process clause of the Fourteenth Amendment thereto.

2. Plaintiff CALVIN BELL is a citizen of the United States and the Commonwealth of Kentucky, presently incarcerated in the Kentucky State Penitentiary under a sentence of life imprisonment. Plaintiff EWELL SCOTT is a citizen of the United States and the Commonwealth of Kentucky, presently incarcerated in the Kentucky State Penitentiary under a sentence of twelve years imprisonment.

3. Pursuant to FRCP 23, plaintiffs sue on behalf of themselves and on behalf of all persons similarly situated, to-wit, inmates incarcerated in prisons and other penal institutions in the state of Kentucky who presently or in

the future will be subject to the jurisdiction of the KENTUCKY PAROLE BOARD, and who have been, are presently, or in the future will be brought before the KENTUCKY PAROLE BOARD for a parole release proceeding. These persons constitute a class so numerous as to make it impracticable to bring them before this Court. There are common questions of law and of fact affecting the rights of such persons to due process of law, and common relief is sought. The claims of the plaintiffs are typical of the claims of the class. These defendants have acted and intend to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole. The plaintiffs will fairly and adequately represent the interests of the class.

4. Defendant KENTUCKY PAROLE BOARD is an independent agency of the state of Kentucky established pursuant to K.R.S. 439.320, and charged by law with the authority to release a prisoner on parole and to conduct hearings to determine whether parole should be granted. Defendant LUCILLE ROBUCK is the Chairman of the Kentucky Parole Board, and defendants CHARLES WILLIAMSON, NEWT MC CARVEY, CARL OWSLEY and GLEN WADE are members of the Kentucky Parole Board.

5. Pursuant to the provisions of K.R.S. 439.330, 439.340, the Board has authority to release on parole all inmates confined in Kentucky prisons or other penal institutions who are eligible for parole. The Board is directed to adopt rules and regulations with respect to the eligibility of inmates for parole, such regulations to be "in accordance with prevailing ideas of correction and reform." To the best of plaintiffs' knowledge and belief, no such rules and regulations have been promulgated by the Board. Alternatively, if such rules and regulations have been promulgated, plaintiffs and the class they represent, to-wit, inmates incarcerated in prisons and other penal institutions in the state of Kentucky, have not been informed of the existence of such rules and regulations and are not aware of their contents.

6. Pursuant to the provisions described above, the Board is directed to study the case histories of persons eligible for parole, to conduct hearings on the desirability of granting parole and to obtain all pertinent information regarding each inmate eligible for parole. An interview of the inmate before one or more of the Board members is also required. The Board is further directed to adopt rules and regulations for the conduct of parole hearings. To the best of plaintiffs' knowledge and belief, no such rules and regulations have been promulgated by the Board. Alternatively, if such rules and regulations have been promulgated, plaintiffs and the class they represent, to-wit, inmates incarcerated in prisons and other penal institutions in the state of Kentucky, have not been informed of the existence of such rules and are not aware of their contents.

7. The Board and its members gather virtually no information about the inmates themselves. In studying the case histories of inmates eligible for parole, they rely entirely upon information contained in the file on the inmate, which is maintained by the prison or other penal institution in which the inmate is incarcerated or by the Kentucky Department of Corrections. They occasionally supplement this file with information that outside sources or third persons may choose to furnish them. There is no organized way in which information is excluded or included in the file, organized in the file, or tested for relevancy, accuracy, reliability, bias or prejudice. The information contained in the file is thus haphazardly gathered, arbitrary in the inclusion and exclusion of facts, and unscientific and irrational with respect to intelligent decisionmaking. The inmate has no access to his file, is not aware of its contents, has no knowledge of what material in the file is being considered by the Board in making its decision, and has no opportunity to rebut or explain adverse information in the file.

8. The inmate is notified in advance of the date of his interview with a member or members of the Parole Board. He is not notified of what issues or information the Board will be considering in making the decision on

his parole. In the absence of such knowledge he does not have a meaningful opportunity to prepare a presentation for consideration by the Board. At the interview before the Board, the inmate is permitted to speak and ask questions, but is not permitted to present evidence and arguments to justify his release. He is not permitted to challenge, cross-examine, or interpret the evidence that will be used by the Board in its decision to grant or deny parole. He is not permitted to be represented by counsel or by lay spokesmen or advocate, or in any manner whatsoever when his parole is being considered by the Board.

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10. At no time, either before or after the decision, is an inmate advised by the Board as to what rules, standards or criteria will be used by the Board in determining whether to grant or deny parole, nor is he advised as to how he must conform his conduct, or as to what is expected of him, so that he may receive parole at a future date.

11. Plaintiff BELL was last given an interview before the Board in March, 1973. Consideration of his parole took place under the conditions described in paragraphs 5 through 10 herein. At that time he was given an eighteen month setback and was informed orally that the prosecuting attorney of the county in which his offense was committed did not want him to be released on parole. His request to see a copy of the prosecutor's letter was denied by the Board. Presumably, he will have another interview before the Board in September, 1974.

13. Plaintiff SCOTT was last given an interview be-

fore the Board in November, 1973. Consideration of his parole took place under the conditions described in paragraphs 5 through 10 herein. Most of the discussion at the interview concerned the facts surrounding his conviction. While in prison, he had enrolled in school and was participating in a group therapy program. He had not committed any disciplinary infraction. After very brief consideration by the Board, he was informed he should "have more time to get together" and was given a twenty-four month setback. Presumably, he will have another interview before the Board in November, 1975.

14. The practices and policies of the Kentucky Parole Board described herein deny to the plaintiffs and the class they represent due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in that they have brought about the continued deprivation of liberty of the plaintiffs and the members of the class without those procedural safeguards necessary to insure a fair and accurate determination of whether or not to grant parole. These practices and policies are violative of due process of law for the following reasons among others:

1. There is no adjudicatory-type hearing on the determination of whether to grant or to deny parole;

2. There is no opportunity for the inmate to be represented by an attorney, lay spokesman or advocate or other representative of the inmate's choosing;

3. There is no opportunity for the inmate to have access to the file that is considered by the Board or to rebut or explain adverse information in said file;

4. The inmate is not notified in advance of what issues or information the Board will be considering, and he is thus unable to prepare a proper presentation for consideration by the Board;

5. The inmate is not permitted to present evidence and arguments to justify his release on parole, nor to challenge, cross-examine or interpret the evidence

that will be used by the Board in its decision to grant or deny parole;

6. No record, transcript or summary of testimony and questions at the interview is prepared and maintained;

7. The Board does not state in writing the reasons for its decisions, and does not make a statement of the factual basis for the decision, or of the rules, standards or criteria used in making the decision.

15. Due process of law is further denied to the plaintiffs and the members of the class by the fact that the criteria, standards, norms or rules actually used by the Board in determining whether to grant or deny parole are unpublished and unarticulated and are applied in a wholly subjective, arbitrary and capricious manner. As a result of the failure of the defendants to articulate what rules, standards or criteria will be applied in the decision to grant or deny parole, plaintiffs and the members of the class do not know how they may conform their conduct to approved standards so that they may receive parole at a future date.

16. As a result of the actions described herein, the plaintiffs and the members of the class have suffered and will continue to suffer serious, immediate and irreparable injury to their constitutional rights and will continue to be incarcerated and deprived of their liberty without due process of law. The plaintiffs and the members of the class have no plain, speedy and adequate remedy at law, and the present suit is the only means of securing the relief requested.

WHEREFORE, Plaintiffs respectfully pray for the following relief:

1. That this Court advance this case on its docket, grant a hearing at the earliest practicable date and cause this case to be in every way expedited.

2. That this Court issue an Order pursuant to FRCP 23(c)(1) authorizing this action to be maintained as a class action.

3. That this Court issue a declaratory judgment to the effect that the practices and policies followed by the defendants in parole release proceedings, as described herein, are violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. That a permanent injunction be issued against the defendants herein, their attorneys, agents, employees, servants, and successors in office, directing them to take the following action:

A. To promulgate rules for the conduct of parole release proceedings which shall provide for the following:

(1) an adjudicatory-type hearing on the determination of whether to grant or deny parole;

(2) The opportunity for the inmate to be represented at such hearing by an attorney, lay spokesman or advocate or other representative of the inmate's choosing;

(3) The opportunity for the inmate to have access to his file prior to the time that said file is considered by the Board and to rebut or explain adverse information in said file;

(4) Notification to the inmate in advance of the hearing as to what issues or information the Board will consider at the hearing;

(5) The opportunity for the inmate to present evidence and arguments to justify his release on parole and to challenge, cross-examine or interpret the evidence that will be used by the Board in making its decision to grant or deny parole;

(6) The preparation and maintenance of a transcript or summary of testimony and questions at the hearing;

(7) A statement in writing of reasons for the Board's decision to grant or deny parole and a statement of the factual basis for the decision and of

the rules, standards or criteria used in making the decision;

(8) Where parole is denied, a statement of what the inmate will be required to do in order to be eligible for parole in the future.

B. To promulgate and publish for distribution to the plaintiffs and members of the class the criteria, standards, norms or rules that will be used by the Board in determining whether to grant or deny parole.

5. That the plaintiffs be awarded any and all other relief to which they or the members of their class may appear to be entitled.

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Deputy Kentucky Public Defender

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

[Filed Feb. 15, 1974]

[Title Omitted in Printing]

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Plaintiffs, Calvin Bell and Ewell Scott, who are now held in the Kentucky State Penitentiary ask leave to file the attached Complaint without prepayment of fees and costs and to proceed In Forma Pauperis pursuant to 28 U.S.C. § 1915. The Plaintiffs' Affidavits in support of this motion are attached hereto.

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/s/ Dean Hill Rivkin
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Deputy Kentucky Public Defender

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

[Title Omitted in Printing]

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Calvin Bell, being duly sworn deposes and says:

1. I am one of the Plaintiffs in the above entitled action.
2. I believe that I am entitled to bring this action in the United States District Court for the Eastern District of Kentucky.
3. The action seeks to enjoin the Defendants from depriving me and members of the class of prisoners to which I belong, of rights secured by the Fourteenth Amendment to the United States Constitution.
4. I believe I am entitled to the redress sought in this action.
5. I know the contents of the Complaint and believe them to be true to the best of my knowledge and belief.
6. I am without assets, and I have no income.
7. Because of my poverty I am unable to pay the costs of this action or give security therefor.
8. If I am not granted leave to prosecute this cause of action In Forma Pauperis I shall continue to suffer irreparable injury.

WHEREFORE, Plaintiff prays that he be granted leave to proceed In Forma Pauperis in this action, without being required to prepay costs or fees or give security therefor.

[Jurat Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

[Title Omitted in Printing]

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Ewell Scott, being duly sworn, deposes and says:

1. I am one of the Plaintiffs in the above entitled action.

2. I believe that I am entitled to bring this action in the United States District Court for the Eastern District of Kentucky.

3. The action seeks to enjoin the Defendants from depriving me and members of the class of prisoners to which I belong, of rights secured by the Fourteenth Amendment to the United States Constitution.

4. I believe I am entitled to the redress sought in this action.

5. I know the contents of the Complaint and believe them to be true to the best of my knowledge and belief.

6. I am without assets, and I have no income.

7. Because of my poverty I am unable to pay the costs of this action or give security therefor.

8. If I am not granted leave to prosecute this cause of action In Forma Pauperis, I shall continue to suffer irreparable injury.

WHEREFORE, Plaintiff prays that he be granted leave to proceed In Forma Pauperis in this action, without being required to prepay the costs or fees or give security therefor.

[Jurat Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed March 15, 1974]

CALVIN BELL, EWELL SCOTT, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

v.

KENTUCKY PAROLE BOARD, ET AL, DEFENDANTS

ORDER

It is ordered that the motion for leave to proceed in forma pauperis be and the same hereby is overruled and that the action be and the same hereby is dismissed.
See Memorandum.

Mac Swinford, Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed March 15, 1974]

CALVIN BELL, EWELL SCOTT, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

v.

KENTUCKY PAROLE BOARD, ET AL, DEFENDANTS

MEMORANDUM

The plaintiffs seek to proceed in forma pauperis in this civil rights class action attacking procedural denials attendant to the operation of the Kentucky conditional release system. The tendered complaint alleges that the parole board utilizes unarticulated standards in defiance of state law, K.R.S. 439.340, and that the release hearings improperly deny (1) an adjudicatory proceeding; (2) representation by an attorney or lay counsel; (3) access to personal files in the possession of the board; (4) advance notification of the issues to be considered; (5) an opportunity to present evidence and cross-examine witnesses; (6) a transcript or summary of evidence; (7) findings of fact or statement of reasons for denial of parole. Analysis of these assertions reveals no deprivation cognizable by the federal courts.

The procedural dictates of the Due Process Clause are activated only upon the deprivation of a right or entitlement of constitutional magnitude. Although the loss of freedom resulting from revocation of parole merits due process applicability, Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972), the denial of parole wreaks no such "grievous loss". Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

> "(A) parole revocation proceeding differs from a review by a parole board to determine whether an inmate should be paroled initially. In the former

> proceeding, the determination is whether the conditional freedom of the parolee should be terminated, because of an alleged violation of the conditions of his parole. In a review to decide whether parole should be granted, the determination is whether an inmate is a suitable prospect for return to society.
>
> This Court is of the opinion that the Due Process Clause does not apply in procedures designed to determine suitability for parole." [1]

While courts will on occasion intervene to correct abuses in the nation's parole system, Morrissey v. Brewer, supra, the nature of this "practical and troublesome area" [2] demands that the states be left free to develop correctional remedies unhampered by pervasive judicial interference in the mechanics of conditional release; the numerous factors involved in the assessment of an inmate's suitability for release demands a flexibility unattainable in a formal adjudicatory hearing. "The Authority . . . is and must be free to weigh all the tangible and intangible factors which determine whether a particular person is ready to return to society before his maximum term has been served." [3] This consideration has led to judicial approval of parole hearings conducted without providing legal representation [4]; a transcript or

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[1] Bradford v. Weinstein, E.D. N.C., 357 F. Supp. 1127, 1131 (1973). Accord, Ganz v. Bensinger, 7th Cir., 480 F.2d 88 (1973); Menechino v. Oswald, 2d Cir., 430 F.2d 403 (1970), cert. denied, 400 U.S. 1023 (1971); Barradale v. United States Board of Paroles and Pardons, M.D. Pa., 362 F. Supp. 338 (1973); Ott v. Ciccone, W.D. Mo., 326 F. Supp. 609 (1970).

[2] McGinnis v. Royster, 410 U.S. 263, 270 (1973).

[3] Dorado v. Kerr, 9th Cir., 454 F.2d 892, 897 (1972), cert. denied, 409 U.S. 934 (1972); Barradale v. United States Board of Paroles and Pardons, supra note 1; Ott v. Ciccone, supra note 1.

[4] Ganz v. Bensinger, supra note 1; Dorado v. Kerr, supra note 2; Barnes v. United States, 8th Cir., 445 F.2d 260 (1971); Buchanan v. Clark, 5th Cir., 446 F.2d 1379 (1971), cert. denied 404 U.S. 979 (1971); Menechino v. Oswald, supra note 1; Schawartzberg v. United States Board of Parole, 10th Cir., 339 F.2d 297 (1968).

summary of evidence [5] ; access to prison files [6] ; notice of issues [7] ; the opportunity to present evidence and cross-examine adverse witnesses [8]; and reasons for denial of parole.[9] Similarly, the failure to promulgate standards, while conceivably in derogation of state law, is not a concern redressable in this forum; "(i)f the rule were otherwise, every erroneous decision on state law matters would come before the federal court as a constitutional question." [10]

An order will be entered overruling the motion for leave to proceed in forma pauperis and dismissing the action.

March 15, 1974 Mac Swinford, Judge

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[5] Dorado v. Kerr, supra note 2; Menechino v. Oswald, supra note 1.

[6] Dorado v. Kerr, supra note 2; Bradford v. Weinstein, supra note 1.

[7] Menechino v. Oswald, supra note 1; Barradale v. United States Board of Paroles and Pardons, supra note 1; Ott v. Ciccono, supra note 1.

[8] Tarlton v. Clark, 5th Cir., 441 F.2d 384 (1971), cert. denied 403 U.S. 934 (1971); Menechino v. Oswald, supra note 1.

[9] Dorado v. Kerr, supra note 2; Mosley v. Ashby, 3d Cir., 459 F.2d 477 (1972); Menechino v. Oswald, supra note 1.

[10] Sims v. Parke Davis & Co., E.D. Mich., 334 F. Supp. 774, 793 (1971), aff'd 6th Cir., 453 F.2d 1259 (1971), cert. denied 405 U.S. 978 (1972); Mosley v. Ashby, supra note 8; United States ex rel Campbell v. Pate, 7th Cir., 401 F.2d 55 (1968); Draper v. Rhay, 9th Cir., 315 F.2d 193 (1963); cert. denied 375 U.S. 915 (1963).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

[Filed March 28, 1974]

[Title Omitted in Printing]

MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

The Plaintiffs, Calvin Bell and Ewell Scott, who are now incarcerated in the Kentucky State Penitentiary, ask leave to proceed on appeal without being required to prepay fees, costs, or give security therefore and to proceed in forma pauperis pursuant to Fed. R. App. P. 24(a). In support of this motion, Plaintiffs attach hereto copies of the affidavits tendered with the Complaint in this action.

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BY /s/ DEAN HILL RIVKIN

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed March 29, 1974]

CALVIN BELL, EWELL SCOTT, Individually and on behalf of all other persons similarly situated, PLAINTIFFS

v.

KENTUCKY PAROLE BOARD, LUCILLE ROBUCK, Chairman of the Kentucky Parole Board, CHARLES WILLIAMSON, NEWT MCCRAVEY, CARL OWSLEY AND GLEN WADE, Members of the Kentucky Parole Board, DEFENDANTS

ORDER

The defendants have filed a motion to proceed on appeal in forma pauperis and tendered a Notice of Appeal.

For the reasons set forth in this court's memorandum of March 15, 1974, a copy of which is attached hereto and made a part hereof, the plaintiffs are denied the right to proceed on appeal in forma pauperis.

The undersigned judge certifies that the appeal is not taken in good faith. 28 U.S.C. 1915(a).

Mac Swinford, Judge

March 29, 1974

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. ———

[Filed April 24, 1974]

CALVIN BELL, EWELL SCOTT, Individually and on behalf of all other persons similarly situated,
PLAINTIFFS-APPELLANTS

vs.

KENTUCKY PAROLE BOARD, LUCILLE ROBUCK, Chairman of the Kentucky Parole Board, CHARLES WILLIAMSON, NEWT MCCRAVEY, CARL OWSLEY AND GLEN WADE, Members of the Kentucky Parole Board, DEFENDANTS-APPELLEES

MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

The Appellants, Calvin Bell and Ewell Scott, who are now incarcerated in the Kentucky State Penitentiary, ask leave to proceed on appeal without being required to prepay fees, costs, or give security therefore and to proceed in forma pauperis pursuant to Fed. R. App. P. 24(a). In support of this motion, Plaintiffs attach hereto copies of the affidavits tendered with the Complaint in this action and a Brief in support of this Motion.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-8081

[Filed July 25, 1974]

CALVIN BELL, ET AL., PLAINTIFFS-APPELLANTS

v.

KENTUCKY PAROLE BOARD, ET AL.,
DEFENDANTS-APPELLEES

ORDER

This cause is before the Court on the motion of the Plaintiffs-Appellants for leave to proceed on appeal in forma pauperis.

Upon consideration thereof, IT IS ORDERED that the motion be and it hereby is granted.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1899

[Filed Jan. 15, 1975]

CALVIN BELL and EWELL SCOTT, PLAINTIFFS-APPELLANTS

v.

KENTUCKY PAROLE BOARD, LUCILLE ROBUCK, Chairman of the Kentucky Parole Board, CHARLES WILLIAMSON, NEWT MCCRAVEY, CARL OWSLEY and GLEN WADE, Members of the Kentucky Parole Board, DEFENDANTS-APPELLEES

ORDER

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges

Plaintiffs Calvin Bell and Ewell Scott, both incarcerated in the Kentucky State Penitentiary and both having been denied parole release following hearings before the Kentucky Parole Board, filed this class action in the United States District Court for the Eastern District of Kentucky, seeking a determination that parole release procedures of the Kentucky Parole Board failed to conform to minimum guarantees under the due process clause of the Fourteenth Amendment to the United States Constitution. Their complaint sought as well the promulgation of detailed regulations to govern parole release hearings which would comport with their views of due process requirements. From a dismissal of their complaint by the district court, the plaintiffs appeal.

The case was submitted to the court upon the record and the briefs and oral arguments of counsel. Upon consideration thereof, it appearing that the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution and that therefore the district court did not err in dismissing the complaint,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1899

[Filed April 2, 1975]

CALVIN BELL and EWELL SCOTT, PLAINTIFFS-APPELLANTS

v.

KENTUCKY PAROLE BOARD, LUCILLE ROBUCK, Chairman of the Kentucky Parole Board, CHARLES WILLIAMSON, NEWT MCCRAVEY, CARL OWSLEY and GLEN WADE, Members of the Kentucky Parole Board, DEFENDANTS-APPELLEES

ORDER

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard in banc.

It appearing to the court that no judge has requested that a vote be taken on said suggestion, the petition for rehearing was considered by the panel and was determined not to be well taken.

It is therefore ordered that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-6438

EWELL SCOTT, ETC., PETITIONER

v.

KENTUCKY PAROLE BOARD, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 15, 1975

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-6438

EWELL SCOTT, on Behalf of Himself
and All Others Similarly Situated — PETITIONERS

V.

KENTUCKY PAROLE BOARD; LUCILLE ROBUCK,
Chairman of Kentucky Parole Board;
CHARLES WILLIAMSON, NEWT McCRAVEY,
CARL OWSLEY, and GLEN WADE, Members
of Kentucky Parole Board, — RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-6438

EWELL SCOTT, on Behalf of Himself
and All Others Similarly Situated, PETITIONERS

V.

KENTUCKY PAROLE BOARD; LUCILLE ROBUCK,
Chairman of Kentucky Parole Board;
CHARLES WILLIAMSON, NEWT McCRAVEY,
CARL OWSLEY, and GLEN WADE, Members
of Kentucky Parole Board, RESPONDENTS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit filed January 15, 1975, is not yet reported and is printed as pages 1a-2a of petitioner's Appendix. The order of the United States Court of Appeals for the Sixth Circuit filed April 2, 1975, denying the petition for rehearing en banc, is unreported and is printed as Appendix 1 to this Brief in Opposition. The opinion of the United States District Court for the Eastern District of Kentucky is dated March 15, 1974, and is not yet reported and is printed as pages 3a-6a of petitioner's Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

I. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT EXTENDS SO FAR AS TO REGULATE THE PROCEDURES FOLLOWED BY A PAROLE BOARD IN DETERMINING WHETHER OR NOT A CORRECTIONAL INSTITUTION INMATE IS SUITED FOR PAROLE RELEASE?

II. WHETHER, ALTHOUGH AN INMATE'S ANTICIPATION OF PAROLE RELEASE MAY BE DETERMINED TO BE PROTECTED BY THE DUE PROCESS CLAUSE, THE VERY NATURE OF THE PAROLE-GRANTING HEARING NONETHELESS MANDATES AGAINST THE REQUIREMENT OF THE TYPE OF ADVERSARY PROCEDURES WHICH PETITIONERS CLAIM TO BE NECESSARY?

STATUTES INVOLVED

The pertinent provisions of Kentucky Revised Statutes 439.330 and 439.340 and the Fourteenth Amendment to the United States Constitution are set forth in the petition at pages 2-4. The respondents accept the petitioners' statement of the case with the exception that the respondents disagree with petitioners' conclusory allegations that the Due Process Clause of the Fourteenth Amendment is applicable to parole-granting procedures.

ARGUMENT

THE PETITION DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS WARRANTING THIS COURT'S EXERCISE OF CERTIORARI JURISDICTION.

At the present time, various United States Courts of Appeals have rendered diverse opinions relative to the applicability of the Due Process Clause of the Fourteenth Amendment to parole release proceedings. It is the respondents' contention that, although there are conflicting opinions, the position adopted by the United States Court of Appeals for the Sixth Circuit in the instant case is the proper interpretation as to the nonapplicability of the Due Process Clause, and certiorari should be denied.

Prior to Morrissey v. Brewer, 408 U.S. 471 (1972), various United States Courts of Appeals rejected due process application to parole-granting procedures. Menechino v. Oswald, 430 F.2d 403 (2nd Cir. 1970) (notice, hearing, transcript, cross-examination, reasons); Mosley v. Ashby, 459 F.2d 477 (3rd Cir. 1972) (reasons); Madden v. New Jersey State Board of Parole, 438 F.2d 1189 (3rd Cir. 1971) (reasons); Tarlton v. Clark, 441 F.2d 384 (5th Cir. 1971), cert. denied, 403 U.S. 934 (1971) (cross-examination); Buchanan v. Clark, 446 F.2d 1379 (5th Cir. 1971) (counsel); Thompkins v. United States Board of Parole, 427 F.2d 222 (5th Cir. 1970) (reasons); Ganz v. Bensinger, 480 F.2d 88 (7th Cir. 1973) (counsel); Barnes v. United States, 445 F.2d 260 (8th Cir. 1971) (counsel); Dorado v. Kerr, 454 F.2d 892 (9th Cir. 1972) (counsel, access to records, record of proceedings, reasons); Schawartzberg v. United States Board of Parole, 399 F.2d 297 (10th Cir. 1968) (counsel). See also Ott v. Ciccone, 326 F.Supp. 609 (M.D.Mo. 1970) (notice).

Since this Court's decision in Morrissey v. Brewer, supra, in addition to the instant case from the United States Court of Appeals for the Sixth Circuit, the United States Courts of Appeals for the Fifth and Seventh Circuits have rejected all due process applicability to parole release proceedings. Scarpa v. United States Board of Parole,[1] 477 F.2d 278 (5th Cir. 1973), vacated on mootness grounds, 414 U.S. 809 (1973); Farries v. United States Board of Parole,[2] 484 F.2d 948 (7th Cir. 1973). See also Wiley v. United States Board of Parole, 380 F.Supp. 1194 (M.D.Pa. 1974); Rankins v. Christian, 376 F.Supp. 1258 (D.V.I. 1973); Barradale v. United States Board of Paroles and Pardons, 362 F.Supp. 338 (M.D.Pa. 1973).

Subsequent to Morrissey v. Brewer, supra, various United States Circuit Courts of Appeals have held due process applies to parole release procedures requiring written reasons for denial of parole. United States, ex rel Johnson, v. Chairman of New York Board of Parole, 500 F.2d 925 (2nd Cir. 1974), vacated on mootness grounds, Regan v. Johnson, 95 S.Ct. 488 (1974); Bradford v. Weinstein, ____F.2d____ (4th Cir. Nov. 22, 1974), rev'g, 357 F.Supp. 1227; Childs v. United States Board of Parole, ____F.2d____ (D.C. Cir. Dec. 19, 1974), aff'g, 371 F.Supp. 1246 (D.D.C. 1973).

1/ Subsequent decisions of the United States Court of Appeals for the Fifth Circuit have stated that Scarpa, supra, has no precedential value in that Circuit. Ridley v. McCall, 496 F.2d 213 (1974); Cook v. Whiteside, 505 F.2d 32 (1974).

2/ Farries, supra, followed Menechino, supra, the latter being partially reversed by U.S., ex rel Johnson, v. Chairman of New York Board of Parole, 500 F.2d 925 (2nd Cir. 1974), vacated on mootness grounds, Regan v. Johnson, 95 S.Ct. 488 (1974).

See also Cooley v. Sigler, 381 F.Supp. 441 (D.Minn. 1974); Craft v. Attorney General of United States, 379 F.Supp. 539 (M.D.Pa. 1974); Candarini v. Attorney General of United States, 369 F.Supp. 1132 (E.D.N.Y. 1974); Johnson v. Heggie, 362 F.Supp. 851 (D.Colo. 1973).

The Due Process Clause of the Fourteenth Amendment does not extend so far as to regulate the procedures followed by a parole board in determining whether or not a correctional institution inmate is suited for parole release. The Fourteenth Amendment requires the safeguards of due process to be applied only where the state is attempting to deprive a citizen of "life, liberty or property." The procedural requirements of the Due Process Clause do not attach themselves to "every conceivable case of government impairment of private interest." Cafeteria and Restaurant Works v. McElroy, 367 U.S. 886, 894 (1961). The interest to be protected must be one of constitutional magnitude. This Court has held that the issue of whether a litigated interest is of such magnitude as to be protected by the Fourteenth Amendment is wholly dependent upon a determination of the extent to which a citizen "will be condemned to suffer a grievous loss" as a result of an unfavorable decision in the proceeding. Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelley, 397 U.S. 254, 263 (1970); also in Morrissey v. Brewer, supra, at 481.

A "grievous loss" requiring due process protections has been found by this Court where welfare benefits were stopped, Goldberg v. Kelley, supra; where wages were garnisheed, Sniadach v.

Family Finance Corporation, 395 U.S. 337 (1969); where a driver's license was revoked, Bell v. Burson, 402 U.S. 535 (1971); where unemployment compensation was withheld, Sherbert v. Verner, 374 U.S. 398 (1963); where an employee holding a government-created job was fired, Board of Regents v. Roth, 408 U.S. 564 (1972); where an individual's parole was revoked, Morrissey v. Brewer, supra; where an individual's probation was revoked, Gagnon v. Scarpelli, 411 U.S. 778 (1973); good time credits, Wolff v. McDonnell, 418 U.S. 539 (1974); public school student's suspension, Goss v. Lopez, ___U.S.___, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975); and prejudgment garnishment of property, North Georgia Finishing, Inc. v. Di-Chem, Inc., ___U.S.___, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975). In each of the examples above, a presently identifiable and substantial interest, cognizable in law and fact, upon which the individual had come to rely, be it welfare payments, a license, a job, school, or conditional liberty, had been deprived, revoked, terminated, taken away, or otherwise infringed upon, without the benefit of the constitutional protections of the Due Process Clause.

This Court in Morrissey, supra, at 481, stated that: "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." In determining that due process applied to parole revocation hearings, this Court emphasized the fact that the benefits of gainful employment, enjoyments of a family, social life and "other enduring attachments of normal life" would

be denied the parolee should he lose his parole. After all, the revocation of conditional liberty obviously results in the loss of a "liberty" presently enjoyed by the parolee or the probated--such a "grievous loss" that fundamental procedural safeguards must be implemented in fact-finding hearings held in such cases.

In addition to Morrissey, supra, petitioners contend that Wolff, supra, bolsters their allegation that their interest in parole release is sufficient to require an application of the Fourteenth Amendment. However, Wolff did not involve parole consideration, but did involve the loss of good time credits already accrued under statute--another presently identifiable and substantial interest. Moreover, in holding that prison disciplinary proceedings are subject to basic procedural requirements due to the revocation of good time credit, this Court in Wolff relied heavily upon the Nebraska Revised Statutes, § 83-1, 107 (Supp. 1972), which provided for the allowance and reduction of good time. In Wolff, supra, it is stated:

> ". . . the State itself has not only provided a statutory right to good time credit but also specified that it is to be forfeited only for serious misbehavior. . .the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated."
> 418 U.S. at 557 (emphasis ours)

Thus, Wolff is merely another instance in which this Court has required due process where the individual is to be deprived of

a substantial interest, i.e., accrued good time credit guaranteed to him by a state statute. It is inapposite where, as in the instant case, the prisoner has a mere anticipation of parole, i.e., the possibility of parole which is neither granted nor guaranteed by statute. KRS 439.340 and 439.330 (see pp. 2-3 of Petitioner's Petition).

However, the instant case is clearly distinguishable from all the above mentioned situations where due process has been held applicable. The interest which petitioners seek to have designated as constitutionally protected within the meaning of the Fourteenth Amendment term "liberty" is nothing more than their hope for parole release. A "hope" does not involve a form of liberty cognizable under the "liberty" of the Fourteenth Amendment. In Morrissey, supra, being on parole meant freedom from prison; in Wolff, good time credit meant actual and definite dimunition of sentence; in each instance a form of "liberty" was affected.

Petitioners' interest in a "hope" for parole release is a mere "anticipation" and does not come within the ambit of the Fourteenth Amendment. When parole is denied, the parole board does not increase the inmate's judicially mandated sentence; he still continues to serve his original sentence less statutory good time credits. To attempt to "equate the possibility of conditional freedom with the right to conditional freedom is illogical." Scarpa, supra, at 282.

In Morrissey, supra, being on parole permitted gainful employment, freedom to be with family and friends, and other

enduring attachments of normal life. 408 U.S. 482. In Wolff, supra, there was a right to statutory good time credit which could be taken away only for major misconduct. 418 U.S. 557. In the instant case, KRS 439.340 and 439.330 grant to the Kentucky Parole Board the discretion to release an inmate on parole when the Board in its discretion determines, based upon many intangibles, that the inmate is "able and willing to fulfill the obligations of a law-abiding citizen. KRS 439.340(2). As a matter of law, the decision to grant parole is a creature of discretion and is the responsibility of the parole board, for the statute does not grant to the inmate either parole or the right to be paroled at a specified time.

The United States Court of Appeals for the Second Circuit, in United States, ex rel Johnson, in determining that due process applied to the parole release decision making process, applied the principles of Morrissey, supra. In Childs, supra, and Bradford, supra, the Courts in addition to applying Morrissey, supra, applied the principles of Wolff, supra, in their determination that due process applied. Respondent disagrees with these applications of Morrissey, supra, and Wolff, supra, to the parole release decision making process, because all that an inmate has at any time before the determination to grant parole is made is a mere anticipation of parole release, not a legally identifiable right which is factually cognizable.

The reasoning of the Sixth Circuit in the instant case and that in Scarpa, supra, is extremely sound in not applying Morrissey, supra, or Wolff, supra, because as was stated in Wiley, supra, at 1198-1199:

"Morrissey, however, does not dictate that prisoners looking forward to release on parole be equated with paroles facing loss of their conditional freedom. While a necessary precondition to revocation of parole and reincarceration is a factual finding that a parolee has violated a condition of his parole, the parole release decision is based on a complex of tangible and intangible, of objective and subjective, factors having to do with psychiatry, criminology, psychology, penology and human relations. In Morrissey, the Court, in footnote 8 of its opinion, 408 U.S. 482, 92 S.Ct. 2593, 33 L.Ed.2d 484, intimated that the due process requirements established therein for parole revocation proceedings need not be extended to those still incarcerated seeking parole. The Supreme Court, quoting approvingly from United States ex rel. Bey v. Connecticut State Board of Parole, 2 Cir. 1971, 443 F.2d 1079, 1086, vacated as moot, 1971, 404 U.S. 879, 92 S.Ct. 196, 30 L.Ed.2d 159, a case which sharply distinguishes between parole revocation proceedings and initial parole decision-making stated: 'It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.' 408 U.S. at 482, n.8, 92 S.Ct. at 2601. This implies at the very least that the Court believes the parole decision-making process does not call for the full panoply of rights due a parolee in a parole revocation proceeding, cf. Wolff v. McDonnell, 1974, ____U.S.____, 94 S.Ct. 2963, 41 L.Ed.2d 935 and may indicate that the Court views the type of interest involved here, i.e., the 'mere anticipation or hope of freedom,' as not being the type of private interest qualifying for due process protection, cf. Board of Regents v. Roth, 1972, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548." (our emphasis)

CONCLUSION

Wherefore, for the reasons above stated, failure of petitioners to present a substantial Federal question, petitioners' petition for writ of certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6438

EWELL SCOTT, etc.,

Petitioner,

v.

KENTUCKY PAROLE BOARD, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6438

EWELL SCOTT, etc.,

Petitioner,

v.

KENTUCKY PAROLE BOARD, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is set out in the Appendix, pp. 21, 23. The opinion of the United States District Court for the Eastern District of Kentucky is also unreported and is set out in the Appendix (hereinafter A.), pp. 14-16.

JURISDICTION

The judgment of the Court of Appeals was entered January 15, 1975 (A. 21). On April 2, 1975, the Court of Appeals denied petitioners' petition for rehearing and suggestion of rehearing *in banc* (A. 23). The petition for a writ of *certiorari* and a motion for leave to proceed *in forma pauperis* were filed on April 29, 1975, and both were granted on December 15, 1975. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constit. amend. XIV: "[N]or shall any State deprive any person of life, liberty or property without due process of law . . . "

Ky. Rev. Stat. §439.330:

(1) The board shall:

(a) Study the case histories of persons eligible for parole and deliberate on that record;

(b) Conduct hearings on the desirability of granting parole;

(c) Impose upon the parolee or conditional release such conditions as it sees fit;

(d) Order the granting of parole;

(e) Issue warrants for persons charged with violations of parole and conditional release and conduct hearings on such charges;

(f) Determine the period of supervision for parolees and conditional releasees, which period may be subject to extension or reduction after recommendation of the division is received and considered;

(g) Grant final discharge to parolees and conditional releasees.

(2) The board shall adopt an official seal of which the courts shall take judicial notice.

(3) The orders of the board shall not be reviewable except as to compliance with the terms of KRS 439.250 to 439.560.

(4) The board shall keep a record of its acts, shall notify each institution of its decisions relating to the persons who are or have been confined therein, and shall submit to the governor a report with statistical and other data of its work at the close of each fiscal year.

Ky. Rev. Stat. §439.340:

(1) The board may release on parole such persons confined in any adult state penal or correctional institution of Kentucky as are eligible for parole. All paroles shall issue upon order of the board duly adopted. As soon as practicable after his admission and at such intervals thereafter as it may determine, the Division of Institutions shall obtain all pertinent information regarding each prisoner, except those not eligible for parole. Such information shall include his criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made. The Division of Probation and Parole shall furnish the circumstances of his offense and his previous social history of the institution and the board. The Division of Institutions shall prepare a report on such information as it obtains. It shall be the duty of the Division of Probation and Parole to supplement this report with such material as the board may request and submit such report to the board.

(2) Before granting the parole of any prisoner, the board shall consider the pertinent information regarding the prisoner and shall have him appear before it, or one or more members

for interview and hearing. A parole shall be ordered only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes he is able and willing to fulfill the obligations of a law abiding citizen.

(3) The board shall adopt such rules or regulations as it may deem proper or necessary with respect to the eligibility of prisoners for parole, the conduct of parole hearings, or conditions to be imposed upon parolees. Regulations governing the eligibility of prisoners for parole shall be in accordance with prevailing ideas of correction and reform.

(4) Whenever an order for parole is issued it shall recite the conditions thereof.

QUESTIONS PRESENTED

1. Does the minimum guarantee of procedural due process safeguarded by the Fourteenth Amendment apply to state parole release proceedings?

2. If the Fourteenth Amendment's guarantee of procedural due process apply to state parole release proceedings, what are the minimum procedures that must be employed by a state parole board in conducting such proceedings?

STATEMENT OF THE CASE

This action was instituted pursuant to 42 U.S.C. §1983 in the United States District Court for the

Eastern District of Kentucky by Ewell Scott and Calvin Bell[1] as a class action on behalf of all inmates incarcerated in the Kentucky penal system who are subject to the jurisdiction of the Kentucky Parole Board (hereinafter referred to as the Board of Parole Board).[2] The action challenged the constitutionality of the absence of minimal procedural safeguards in parole release proceedings conducted by the Parole Board, which has the authority, pursuant to *Ky. Rev. Stat.* §§439.330 and 439.340, to release on parole all eligible inmates in the Kentucky penal system.[3] The complaint (A. 2), seeking declaratory and injunctive relief, was tendered along with a motion for leave to proceed *in forma pauperis* and properly authenticated affidavits.

In their complaint, the petitioners set forth allegations describing the paucity of procedures followed by the Parole Board in parole release hearings (Complaint,

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[1]As more fully set out in the petitioners' response to respondents' suggestion of mootness, the named petitioner Scott was released on close parole supervision on November 26, 1975, and is subject to the jurisdiction of the Parole Board until 1984. Counsel has learned that the named petitioner Bell, who was released on parole during the course of this action, is dead.

[2]A small number of inmates in Kentucky serving life sentences are permanently ineligible for parole pursuant to *Ky. Rev. Stat.* §435.090, and are not included in the class on whose behalf this action was brought.

[3]A more complete discussion of the statutes and regulations governing the operations of the Parole Board is contained on pp. 5-7, *infra*.

paras. 6-10, A. 4, 5).[4] These allegations form an essentially complete picture of the parole release decisionmaking process of the Kentucky Parole Board. They are recounted below, preceded by a description of the pertinent Kentucky statutes and regulations relating to parole release.

In Kentucky, the jury is vested with the primary responsibility for fixing the sentence of a convicted defendant. This sentence is expressed as a definite term of years chosen within a range of years for different class felonies. *Ky. Rev. Stat.* §532.060 (1) and (2). Under limited circumstances, a judge can reduce the sentence imposed by a jury. *Ky. Rev. Stat.* §532.070. The ultimate responsibility for determining the actual time of release is delegated to the Parole Board. *Ky Rev. Stat.* §532.060 (3).

The legislative mandate of the Kentucky Parole Board is exceptionally broad. *Ky. Rev. Stat.* §439.330, which defines the parameters of the Board's powers, orders the Board to "[s]tudy the case histories of persons eligible for parole, and deliberate on that record," "[c]onduct hearings on the desirability of granting parole," "[i]mpose upon the parolee . . . such conditions as it sees fit," and "[o]rder the granting of parole. . . ." The orders of the Board are expressly

[4]Because the District Court dismissed the complaint without requiring an answer by the defendants, the allegations of the complaint are deemed to be true for the purpose of testing the constitutional correctness of the District Court's action. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 476-77 (1972); *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Fischer v. Cahill*, 474 F.2d 991 (3d Cir. 1973).

nonreviewable except as to compliance with the provisions of its organic mandate. *Ky. Rev. Stat.* §439.330 (3). In amassing information that the Board deems relevant to its parole release decision, it relies heavily on the Kentucky Department of Corrections, its mother agency, which is required by *Ky. Rev. Stat.* §439.340 (1), to compile for each inmate such information as previous social history, circumstances of the offense, criminal record, and employment and attitude in prison. By statute, the Board also relies on prison officials, who have a duty to furnish the Board reports on the conduct and character of any prisoner and any other facts deemed pertinent by the Board, *Ky. Rev. Stat.* §439.380, and prosecuting attorneys, who must transmit to the Board a concise statement of the facts adduced at trial or at a hearing on a guilty plea. *Ky. Rev. Stat.* §439.370. The Board also is authorized by *Ky. Rev. Stat.* §439.335 to use the polygraph, truth serum, or any scientific means for personality analysis in its parole release decisionmaking.

Before granting the parole of any prisoner, the Board is directed to "consider the pertinent information regarding the prisoner and shall have him appear before it, or one or more members for interview and hearing." *Ky. Rev. Stat.* §439.340 (2). Following the hearing, the Board can order a parole "only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed only when arrangements have been made for his proper employment or for his maintenance and care, and when the Board believes he is able and willing to fulfill the obligations of a law abiding citizen." *Id.*

Pursuant to legislative directive, the Board is commanded to promulgate regulations governing the basic phases of its operations. *Ky. Rev. Stat.* §340 (3). These regulations, which "shall be in accordance with prevailing ideas of correction and reform," *Id.*, were updated effective April, 1975. They are appended to this Brief in their entirety as Appendix A. They begin by setting minimum time spans an inmate must serve before becoming eligible for parole reivew. *Ky. Admin. Reg.* 501, 1:010 §§2-7. These spans range from four months for persons serving a one year sentence to two years for persons serving a sentence of from nine to fifteen years; persons serving a sentence of from fifteen to twenty-one years must serve a minimum of four years; those with sentences of over twenty-one years must serve a minimun: of six years. In its discretion, the Board may "review the case of any inmate for parole consideration prior to his eligibility date if it appears advisable to do so." *Ky. Admin. Reg.* 501, 1:010 §8. Following a prisoner's initial parole review, any further reviews "shall be at the discretion of the Board." *Ky. Admin. Reg.* 501, 1:010 §§2, 3, 4.

Next, the regulations turn to procedures and substantive criteria employed in paroie release hearings.[5] The pertinent regulation, in full, reads:

[5]In the required public hearing conducted on these regulations, the undersigned counsel appeared for the members of the class in this action and urged the Board, orally and in writing, to adopt parole release procedures necessary to comport with what, by then, the vast majority of courts of appeals had held to be minimally required by the Constitution. 1 Ky. Interim Leg. Rec. 45 (No. 7 1974-75). As the regulation evinces, none of these recommendations were adopted.

"The parole hearing will consist of an interview by the board, or a quorum of the board, with the inmate involved. In instances when the inmate is too ill to appear before the board, the board may, at its discretion, appoint one (1) member to interview the inmate in the hospital where he is confined and report back to the remaining members. In this instance, as in all cases, a vote by a quorum is required before action is taken. In reaching their decision, the board shall consider:

(1) Current offense;
(2) Prior record;
(3) Institutional adjustment and conduct;
  (a) disciplinary reports;
  (b) loss of good time;
  (c) work and program involvement.
(4) Attitude toward authority;
  (a) before incarceration
  (b) during incarceration
(5) History of alcohol or drug involvement;
(6) History of prior probation, shock probation or parole violations;
(7) Educational and job skills;
(8) Prior employment history;
(9) Emotional stability;
(10) Mental capacities;
(11) Terminal illness;
(12) History of deviant behavior;
(13) Official and community attitudes toward accepting inmate back in the county of conviction;
(14) Review of parole plan;
  (a) housing;
  (b) employment;
  (c) need for community treatment and follow-up resources such as: 1. Halfway Houses and residential treatment centers, 2. Compre-

hensive care centers, 3. Service centers, 4. Individual counselling with private social agencies and private treatment resources such as psychiatrists and psychologists;

(15) Any other factors involved that would relate to the inmate's needs and the safety of the public."

Ky. Admin. Reg. 501, 1:010 §9.

The remainder of the regulations deal with parole revocation and are not germane in this action.

Illuminating the statutes and regulations comes the description of the Kentucky parole release process contained in the allegations of the complaint. In studying the case histories of inmates eligible for parole, the Board and its members rely entirely on information contained in the file of the inmate that is maintained by the institution in which the inmate is confined or by the Kentucky Department of Corrections. There is no standard way in which information is excluded or included in the file, organized in the file, or tested for relevancy, accuracy, reliability, bias, or prejudice. The inmate has no access to his file, is not aware of its contents, has no knowledge of what material is being considered by the Board in reaching its decision, and has no opportunity to rebut or explain adverse or erroneous information in the file. (Complaint, para. 7, A. 4).

The inmate is notified in advance of the time of the scheduled hearing with a member or members of the Board. He is not notified of what issues or information the Board will be considering in making the parole decision. At the interview before the Board the inmate is permitted to speak and ask questions, but is not permitted to present evidence and arguments to justify

his or her release; The inmate also is not permitted to challenge, cross-examine, or interpret the evidence that will be used by the Board in its decision to grant or deny parole. No counsel or lay advocate is permitted to appear or speak in the inmate's behalf at the hearing. (Complaint, para. 8, A. 4).

No record, transcript, or summary of the testimony and questions at the interview is prepared and maintained. The Board announces its decision orally, often at the conclusion of the hearing, and generally only with minimal deliberation. Occasionally, oral reasons for the decision are given, but written reasons are not given, and there is no statement of the factual basis for the decision, nor of the rules, standards, or criteria used in making the decision. (Complaint, para. 9, A. 5). At no time, either before or after the decision, is the inmate advised by the Board as to what rules, standards, or criteria will be used by the Board in determining whether to grant or deny parole, nor is the inmate advised as to how to conform his or her conduct, or as to what is expected, so that parole may be granted at a future date. (Complaint, para. 10, A. 5).[6]

In the complaint, the named petitioners also alleged the particular circumstances surrounding what at the time were the last interviews given to them by the Board. The petitioner Scott stated that the majority of the discussion at the interview concerned the facts

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[6]At the time this action was filed, the Board had no published criteria similar to those recently announced in the Kentucky Administrative Register. See p. 7, *supra*. Under the record as it stands, it cannot be assumed that this list of criteria is formally supplied to prisoners either prior to or at the parole release hearing.

surrounding his conviction, even though, while incarcerated, he had enrolled in school, was participating in group therapy programs, and had not committed any disciplinary infractions. After very brief consideration by the Board, he was informed that he needed "more time to get together" and was postponed for further parole consideration for twenty-four months. (Complaint, para. 13, A. 5).

The complaint continued by alleging a number of constitutional deficiencies in the practices and procedures employed by the Board in the conduct of parole release hearings. The most prominent of these included:

(1) The prospective parolee is denied notification of and access to any of the material considered by the Board in reaching its decision.

(2) At the parole hearing–which often lasts only minutes–the inmate is not afforded a meaningful opportunity to present evidence in his or her behalf.

(3) At no time throughout the proceedings is an inmate permitted to be represented by counsel or by a lay representative or advocate.

(4) The unsuccessful inmate neither is provided a written statement of reasons explaining the basis for denial nor is informed of the criteria, if any, used by the Board in reaching its decision, nor of the conditions or requirements which, if fulfilled, would allow the inmate to be favorably considered by the Board. (Complaint, para. 14, A. 6). On the basis of these allegations, the petitioners sought declaratory and injunctive relief designed to require modification of the procedures employed by the Board in conformance with due process.

In a memorandum opinion, the District Court–without the benefit of any responsive pleadings–overruled the petitioners' motion for leave to proceed *in forma pauperis* and dismissed the action. The opinion, primarily citing pre–*Morrissey v. Brewer*, 408 U.S. 471 (1972) cases that had rejected similar challenges, concluded that the denial of parole "wreaks no such 'grievous loss' " as to activate the minimum procedural safeguards of the Fourteenth Amendment (A. 14).[7] The plaintiffs duly filed a motion for leave to appeal *in forma pauperis*, but this motion was denied by the District Court on the ground that the appeal was not taken in good faith. See 28 U.S.C. §1915 (a).

Thereafter, the plaintiffs moved the Court of Appeals for leave to appeal *in forma pauperis*, and this motion was granted. Following full briefing and argument, the Sixth Circuit affirmed the judgment of the District Court. In its *per curiam* opinion, the court, after skeletally reviewing the applicable facts, baldly concluded that "the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution." (A. 21). The petitioners filed a petition for rehearing and suggestion of the appropriateness of a rehearing *in banc*, citing post argument decisions rendered by two other Courts of Appeals ruling that minimum procedural safeguards of due process apply in parole release proceedings. The Sixth Circuit denied the petition, and, on December 15, 1975, this Court granted *certiorari*.

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[7]The District Court was not writing on a clean slate in Kentucky. In *Ornitz v. Robuck*, 366 F.Supp. 183 (E.D. Ky. 1973) and *Harrison v. Robuck*, 508 S.W.2d 767 (Ky. 1974), due process attacks similar to the one in the present case were firmly rejected.

On January 19, 1976, in response to a suggestion of mootness filed by the respondents and a subsequent response in opposition to the suggestion of mootness and a motion to substitute named petitioners or, in the alternative, to intervene filed by the petitioners, the Court entered an order deferring the mootness question to the hearing of the case on the merits.[8]

SUMMARY OF ARGUMENT

A. The opinions below, rejecting outright the threshold applicability of the due process clause to parole release proceedings, not only run counter to the trend of recent decisions in this Court affording due process protections to individuals in a variety of settings whose liberty or property interests are impaired by government action but also squarely conflict with the overwhelming weight of judicial authority and scholarly opinion on the issue. More fundamentally, the decisions below rest on a distortion of the realities of the parole system–its role in the sentencing and correctional process, its operations, and its impact on inmates.

Given this Court's recognition of the value of affording due process protections to students facing suspension, parolees, probationers, prisoners in disciplinary hearings, and others, it is only logical and fair that due process likewise be afforded to prisoners eligible for parole review. Important interests of the state and the inmate are at stake in this process, called

[8]The petitioners respectfully refer the Court to their motion and supporting brief for a full development of the mootness issue.

in a report by a subcommittee of the House Judiciary Committee "the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. at 3 (1975). These interests were largely overlooked in the decisions below, which are premised on a flawed and incomplete view of the parole release process. Far from an unfathomable system best left to unhindered expertise and discretion, the concept of parole embodies three relevant elements militating in favor of due process protection. *First*, parole is inseparable from the sentencing process. *Second*, release on parole is the predominant mode of release for prisoners today. *Finally*, parole release is not leniency but is specifically considered by sentencing judges in fixing sentences. The partially predictive and discretionary nature of the process, moreover, is more reason–not less–for the introduction of due process safeguards into parole decisionmaking. Recent actions by the U.S. Board of Parole, in structuring its discretion, subvert the perspective of the parole process contained in the decisions below and point out the necessity for procedural safeguards.

Likewise, the nature of the prisoner's interest in parole is substantial. The expectation of parole release is one that is realized for a very large number of prisoners; that is expected to be so realized by legislators in setting statutory maxima and by judges or juries in setting what, in effect, are partially indeterminate sentences; and that is realized or not by a process that essentially involves a deferred determination of the wisdom of continued incarceration or conditional liberty. Far from a thin hope, parole release is a reality for most prisoners today.

This reality has been recognized by the vast majority of courts addressing the issue. Since *Morrissey v. Brewer*, 408 U.S. 471 (1972), buttressed by *Wolff v. McDonnell*, 418 U.S. 539 (1974), no court of appeals has held to the position that due process does not apply to parole release proceedings. This position is compelled by the Court's perception in *Morrissey* of parole as "an integral part of the penological system," and of the necessity for a hearing even when the exercise of discretion is involved, 408 U.S. at 477, 483, and by the implicit recognition in McDonnell that liberty interests are implicated in parole release proceedings.

B. Once it is determined that parole release proceedings qualify for due process protection, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. at 481. Because of the absence of a concrete factual record in this case, the Court may decide, after ruling on the applicability question, to go no further and remand the case to the District Court for the development of a record upon which the contents of the required procedures may sharply be forged.

Should the Court reach the question, the petitioners contend that the interests of the Board in the efficient administration of the parole process, is not denying or granting release on the basis of inaccurate or incomplete information, and in the fair treatment of its constituency, when balanced with the interest of the prisoner in release, counsel in favor of the appropriateness of the following procedures:

(1) The right to adequate notice of, and reasonable access to, factual information upon which an adverse decision may be predicated; except, in cases where law

enforcement proceedings or investigation will be interfered with, personal safety is unduly jeopardized, or a clearly unwarranted invasion of privacy will result, narrowly drawn exceptions may be propounded to control access to the particular material.

(2) At the time of each parole review, the right to appear in person for a reasonable time before the Board, a panel of the Board, a Board member, or a hearing examiner; to submit supporting written material in advance of the hearing for inclusion in the file made available to the person conducting the hearing, and to rebut information or recommendations that may prompt a denial or postponement of parole.

(3) The right to the assistance of an advocate – either a lawyer, a law student, another inmate, a family member, a friend, or a member of the correctional staff–throughout the proceedings. This right should include an opportunity for the advocate to have access to, and consult with the prisoner about, the material referred to in paragraph (1) above. Petitioners recognize that the role of counsel can be structured so as to limit participation both as to time and manner.

(4) The right to a written statement specifying, with evidentiary and factual support, the reasons for denial and, when feasible, the conditions, which if fulfilled, would likely result in favorable parole consideration at a specified future date.

ARGUMENT

I.

PAROLE RELEASE PROCEEDINGS IMPLICATE INTERESTS IN LIBERTY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In the opinions below, the threshold applicability of the due process clause to parole release proceedings conducted by the Kentucky Parole Board was rejected outright. This rejection not only runs counter to the trend of recent decisions in this Court affording due process protections to individuals in a variety of settings whose liberty or property interests are impaired by governmental action, but also squarely conflicts with the overwhelming weight of judicial authority and scholarly opinion on the very issue presented here. More fundamentally, the decisions below rest on a distortion of the realities of the parole system its role in the sentencing and correctional process, its operations, and its impact on inmates.

A. The Recent Application of Minimum Due Process Protections to Individuals With Liberty or Property Interests Adversely Affected by Government Action in a Variety of Settings Reflects the Adaptability of the Concept of Due Process to Changing Realities.

Since *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (due process before garnishment of wages), this Court, in an almost unbroken line of cases, has applied the safeguards of the due process clause to a

host of situations where liberty and property interests formerly thought to be exempt from constitutional protection were threatened by unchecked government action. See, *e.g. Goss v. Lopez*, 419 U.S. 565 (1975) (due process before school suspensions); *Taylor v. Hayes*, 418 U.S. 488 (1974) (due process before contempt citation); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (due process may require counsel in probation revocation hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (due process before state-assisted repossession); *Bell v. Burson*, 402 U.S. 535 (1971) (due process before suspension of driver's license); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (due process before public posting of name forbidding individual from purchasing liquor); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process before termination of welfare benefits). Although the content of the prescribed protections has been held to vary from case to case, each recognizes the quintessential value of procedure in our system of government, "for it is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971). Implicit in these decisions is a respect for the individual adversely affected by important decisions of governmental bodies and a healthy concern over the integrity of the decisionmaking processes employed by the multitude of agencies wielding government power. As one influential commentator has observed in a context directly relevant to this case:

> "A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual no matter how degenerate. It is a radical departure from tradition to accept for a defined class of persons, even criminals, a regime in which their right to liberty is determined by officials

> wholly unaccountable in the exercise of their power and through processes which deprive them of an opportunity to be heard on the matters of fact and policy which are relevant to the decisions made." Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 923 (1962).

As the above line of cases evinces, the bulwark of this tradition has been the due process clause, whose "touchstone . . . is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Kent v. United States*, 383 U.S. 541, 554 (1966).

In the administration of correctional justice, the general area of concern in this case, the principles animating the extension of due process in the recent cases of this Court have been solidly rooted. "There is no iron curtain drawn between the Constitution and the prisoners of this country. [T]he position [that] implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause [is] plainly untenable." *Wolff v. McDonnell*, 418 U.S. at 555-56. See also *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). Yet, in spite of these recent developments, one major area thus far has remained immune from this Court's scrutiny: the parole release process, which has been recognized in a recent report of a subcommittee of the House Judiciary Committee 'as the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map." H.R. Rep.

No. 94-184, 94th Cong., 1st Sess. at 3 (1975). A complete understanding of the contours of the constitutional issues involved first requires a description of the parole release process as viewed by commentators and the courts.

B. The Realities of the Parole Release Process Belie the Position of Non-Intervention Adopted by the Courts Below.

In its memorandum opinion, the District Court refused to lay down minimal due process standards for parole release hearings, claiming that "the nature of this 'practical and troublesome area' demands that the states be left free to develop correctional remedies unhampered by pervasive judicial interference in the mechanics of conditional release." (A. 15). Ironically, the Chairman of the U.S. Board of Parole disputes the District Court's view that minimal judicial intervention will straightjacket the parole system: "Much has been done to improve parole, and I would be the first to say that the courts have been extremely influential in this respect." Sigler, *Abolish Parole?*, 39 Fed. Prob. 42, 48 (June 1975). This expert view is based on the realities of a system that has been carefully scrutinized in recent years.

It is the overwhelming sentiment of careful observers of parole release decisionmaking that parole boards, as they currently function in most jurisdictions, are "one of the last bastions of unchecked and arbitrary power in America." California Assembly's Select Committee on Administration of Justice, *Parole Board Reform in California—Order Out of Chaos* 15 (1970). A respected

federal judge has described the system as one in which "parole officials carry on for the most part the motif of Kafka's nightmares." Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 15 (1972). A number of national task forces, study commissions, and observers who have reviewed the performances of parole boards have reached conclusions substantially similar to the one voiced by the subcommittee of the House Judiciary Committee:

> "Everywhere the Subcommittee went they found universal dissatisfaction with the parole process. Wardens claimed that it was a major cause of institutional tension. Inmates felt that they were being treated inequitably. Judges felt that discrepancies within the system made a mockery of the sentencing process." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. at 2 (1975).

See also National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, 389-435 (1973); Citizens' Inquiry on Parole and Criminal Justice, Inc., *Prison Without Walls: Report on New York Parole*, passim (1975); Official Report of the New York State Commission on Attica, *Attica* 93-102 (1972);[9] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 85-86 (1967); D. Stanley, *Prisoners Among*

[9]Compellingly, the Attica Commission pinpointed the parole release procedures followed by the New York State Board of Parole as one of the central causes of inmate frustration and unrest leading to the tragedy at Attica: "[A]s presently operated, parole procedures are unfair, and appear to inmates to be even more inequitable and irrational than they are." *Id.* at xviii.

Us: The Problem of Parole, passim (in press The Brookings Institution, 1976); K. Davis, *Discretionary Justice* 126-41 (1969); F. Cohen, *The Legal Challenge to Corrections* 26-63 (1969); Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 Am. U.L. Rev. 477 (1973); Parsons-Lewis, *Due Process in Parole-Release Decisions*, 60 Calif. L. Rev. 1518 (1972); Bixby, *A New Role for Parole Boards*, 34 Fed. Prob. 24 (June 1970); Tappan, *The Role of Counsel in Parole Matters*, 3 Prac. Law. 21 (February 1957).

Embodied in a *realistic* concept of parole are three relevant elements. First, as the Chairman of the U.S. Board of Parole has noted, "the parole process is inseparable from the sentencing process." Sigler, *Abolish Parole?* 39 Fed. Prob. 42, 47 (June 1975). "[T]oday parole boards and judges are expected to exercise their discretion to determine the proper sentence . . . parole legislation involves essentially a delegation of sentencing power to parole boards. The parole decision involves many of the same kinds of factors that are involved in the original sentencing decision." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967). In short, "the function of parole boards at release hearings and of judges at sentencing are virtually identical." Parsons-Lewis, *Due Process in Parole Release Decisions*, 60 Cal. L. Rev. 1518, 1534 (1972).

Second, release on parole is not an exceptional stroke of good fortune, saving a few prisoners from serving their full term. In 1970, 72% of those adult felons who left prison did so on parole. "Parole is the predominant mode of release for prison inmates today, and it is

likely to become even more so." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 389 (1973). In Kentucky, for example, parole accounted for approximately 60% of all releases from adult felony institutions. Kentucky Bureau of Corrections, Office of Statistical Information, *Parole Recommendation and Deferment: A Study of the Kentucky Parole Board's Activities for 1973-74* at 1 (1975). In 1974-75, of 2,676 prisoners appearing before the Kentucky Parole Board, 1,410 were released to parole. Kentucky Bureau of Corrections, Office of Statistical Information, *Parole Board Activities, 1951-74*. The Official Report of the New York State Commission on Attica expressed the truth tersely: "In practice, the Parole Board–not the judge–decides how long an inmate will serve time." *Attica* 93 (1972).

Third, parole release is not "leniency." Studies have shown that "actually prisoners serve as much time in confinement in jurisdictions where parole is widely used as in those where it is not." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 62 (1967). According to a recent survey, the great majority of federal judges consider parole in sentencing and approximately one-half sentence on the assumption that the prisoner will be released after serving one-third of it. Two-thirds of the judges said that they expected sentenced defendants to be released before serving the maximum sentence imposed. Project, *Parole Release Decision Making and the Sentencing Process*, 84 Yale L.J. 810, 882 n.361 (1975) (hereinafter cited as Yale Project).[10]

[10]For a recent statistically documented discussion of the relationship between sentencing and parole, see *United States v. Jenkins*, 403 F.Supp. 407 (D. Conn. 1975).

Thus, "today . . . the legal maximum is not considered the norm. Parole . . . should not be considered any more a matter of grace than any sentence which is less than the maximum provided for by statute." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967); see, *e.g.*, *Ky. Rev. Stat.* §439.340 (parole neither an award of clemency nor a pardon).[11]

One additional aspect of parole release decision-making, relied on by the District Court as justification for excluding any of the strictures of minimum due process from the confines of the parole hearing, deserves further attention; *i.e.*, the role of discretion and predictive judgment. As explained by the District Court: " 'The Authority . . . is and must be free to weigh all the tangible and intangible factors which determine whether a particular person is ready to return to society before his maximum term has been served.' " (A. 15). *quoting Dorado v. Kerr*, 454 F.2d 892, 897 (9th Cir. 1972). This notion, that due process would unduly intrude upon the discretionary and predictive judgments made by parole boards, conflicts once again with the operative (as opposed to espoused) factors motivating parole release decisions and with prior decisions of this Court rejecting regimes of unbridled

[11]Parole serves other important state functions. It provides an incentive mechanism assisting in the control of internal prison discipline. It is a control measure for reducing prison populations to constitutionally acceptable levels. And it allows the executive and judicial branches to share–and serve as a check on each other–responsibility for a decision with awesome consequences for the individual. See generally Comment, *The Parole System*, 120 U. Pa. L. Rev. 282 (1971).

discretion exercised under the guise of benevolent expertise.[12]

As recognized by Professor Kadish, the argument that legal rules will only operate to impair the reliability of expert judgment is without proper foundation for five reasons:

(1) The goal of rehabilitation—a main tenet of parole release decisionmaking—is not exclusive in our society. "Reverting to elementary principles for a bit, we ought to recall that individualized justice is *prima facie* at war with such concepts, at least as fundamental, as equality, objectivity, and consistency in the law." M. Frankel, *Criminal Sentences: Law Without Order*, 10 (1973);

(2) Expert judgment contains premises and assumptions that deserve challenge and careful scrutiny;

(3) The decision to release a prisoner is often predicated on reasons unrelated to rehabilitation, *e.g.*, prison overcrowding. See *New York Times*, January 5, 1976, at 1, Col. 2 (city ed.) (at least six southern states are releasing prisoners on parole because of prison overcrowding);

(4) Correctional judgments turn on matters of historical fact (*e.g.*, the nature and number of past

[12]The petitioners acknowledge that the discretion exercised by the Board in parole release decisionmaking differs enough, for constitutional purposes, from the discretion exercised in parole revocation decisionmaking (see *Morrissey v. Brewer*, 408 U.S. at 479-80) to warrant a relaxation of the procedures mandated by *Morrissey* in parole revocation hearings (*e.g.*, confrontation and cross-examination). But, we submit, this distinction is without a difference insofar as the threshold applicability of due process is concerned.

arrests, employment status, etc.), as well as scientific ones; and

(5) Overburdened parole boards, like other government agencies, commit errors. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv.L. Rev. 904, 924-28 (1962).

The prescience of Kadish's observations is revealed in recent actions taken by the U.S. Board of Parole. In an attempt to reduce by its own initiative "the arrant subjectivism of undisciplined and unguided discretion," Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 831, (1961), the Board has promulgated detailed guidelines setting forth normal periods of incarceration for inmates to serve before release "for various combinations of offense . . . and offender . . . characteristics . . . [assuming] good institutional progress." 28 C.F.R. §2.20(b), *as amended*, 40 Fed. Reg. 41333 (1975).[13] The average time to be served is found by measuring the classification given the particular offense—*e.g.*, a minor theft is "low," theft of a single motor vehicle not for resale is "moderate," organized vehicle theft is "high," robbery is "very high"—with the "offender characteristics" as disclosed by the "salient factor score." This score comprises the applicant's parole prognosis as measured by nine factors. The striking fact is that eight of the nine factors relate to the inmate's preincarceration record and behavior. 40 Fed. Reg. 41328, 41337, generally known to the inmate and the sentencing judge at the time of

[13]A copy of the Guidelines, as most recently revised, is annexed to this brief as Appendix B. For a comprehensive analysis of the guidelines, see Yale Project, *passim*.

sentencing; that none of them involve "delicate" or "sensitive" or "confidential" matters; and none involve subtle, complex psychological-medical-criminological evaluations.[14]

Thus, the federal Board's own exercise of discretion has gone far to demystify the parole process, and to put in perspective such descriptions of the parole process as relied on by the District Court here. While parole decisionmaking remains a complex, multi-faceted inquiry not analogous to a typical lawsuit, it is plain that there are matters germane to the decision whose accurate and fair determination can only be maximized through the introduction of due process safeguards into the process. The perceptions given voice by this Court in *Scarpelli* and in *Morrissey* in the probation and parole revocation context are indistinguishable in the context of parole release: "Both the . . . parolee and the State have interests in the accurate finding of fact and the informed use of discretion." *Gagnon v. Scarpelli*, 411 U.S. at 785; "Society thus has an interest in not having parole revoked because of erroneous information . . . and . . . a .further interest in treating the parolee with basic fairness. . . ." *Morrissey v. Brewer*, 408 U.S. at 484.

[14]As listed above, p. , as of April 1, 1975, the Kentucky Parole Board began to employ an unweighted list of factors in reaching its parole release decisions. Similar criteria, 28 C.F.R. §2.19, listed by the U.S. Parole Board, have been described as a "laundry list," P. Hoffman & D. Gottfredson, *Paroling Policy Guidelines: A Matter of Equity* at iv (June 1973) (NCCD Parole Decisionmaking Project Supp. Rep. No. 9) (preface M. Sigler), "in recognition of the limited utility of such an inclusive and unweighted list in structuring discretion and making decisions. Yale Project at 832, n.104.

In juvenile law proceedings, the shield of discretion often invoked by government decisionmakers has been pierced on a number of occasions by this Court in recognition of the fact that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *In re Gault*, 387 U.S. 1, 18 (1967). In *Kent v. United States*, 383 U.S. 541 (1966), the Court first canvassed the realities of the juvenile court system and reached conclusions about the functioning of juvenile court proceedings remarkably relevant to the operations of the present parole system in most states: "While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees. . . ." *Id.* at 555. Again, in *In re Gault*, 387 U.S. 1 (1967), the Court looked past the theoretical justifications for the juvenile court system to its theory in use. It found that:

> "[t]he absence of substantive standards has not necessarily meant that children receive careful compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." *Id.* at 18-19.

Most recently, in *Breed v. Jones*, 421 U.S. 519 (1975), the Court, again recognizing " that there is a gap between the originally benign conception of the system and its realities," *Id.* at 528, rejected an argument substantially similar to the one adopted by the District

Court here: "We do not agree with petitioner that giving respondent the constitutional protection against multiple trials in this context will diminish flexibility and informality to the extent that those qualities relate uniquely to the goals of the juvenile court system." *Id.* at 535.

In the field of juvenile law, as in all other areas of governmental endeavor, a chief vehicle by which our constitutional traditions seek to safeguard the interests of government and the individual is in the flexible concept of due process. As Mr. Justice Frankfurter authoritatively observed in his oft-cited concurring opinion in the *Joint Anti-Fascist* case:

> "That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depends on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of righteousness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951).

C. Parole Release Proceedings Qualify For Due Process Protection Under the Standards Set Forth In *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Wolff v. McDonnell*, 418 U.S. 539 (1974).

In *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Wolff v. McDonnell*, 418 U.S. 539 (1974), the minimum protections guaranteed by the due process

clause were applied, respectively, to parole revocation proceedings and prison disciplinary proceedings involving the potential forfeiture of a prisoner's good time credits. Both cases first analyzed the nature of the liberty interest asserted by the parolee and prisoner. A similar analysis of the individual interests involved in parole release proceedings supports the application of due process to these proceedings. This analysis also has been adopted by the overwhelming majority of cases decided after *Morrissey v. Brewer, supra*, and buttressed by *Wolff v. McDonnell, supra*, reaching the result urged by the petitioners here.

1. The nature of a prisoner's interest in parole release embodies "real substance."

The insight into "the function of parole in the correctional process" with which the Chief Justice began the opinion in *Morrissey* neatly sums up the discussion of the realities of the parole system contained in part B, *supra*, and provides a logical point of departure in analyzing the nature of the prisoner's interest in parole release:

> "During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system.... Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison." 408 U.S. at 477.

As recounted above, pp. 19-20, the expectation of parole release is one that is realized for a very large number of prisoners; that is expected to be so realized by legislators in setting statutory maxima and by judges or juries in setting what, in effect, are partially indeterminate sentences; and that is realized or not by a process that essentially involves a deferred determination of the wisdom of continued incarceration or conditional liberty. It is, in short, "more than an abstract need or desire . . ., more than a unilateral expectation" of release (*Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); it is an expectancy that "has real substance" (*Wolff v. McDonnell*, 418 U.S. at 557; *cf. Goss v. Lopez*, 419 U.S. 565, 576 (1975) (every deprivation which is "not *de minimus*" implicates due process *Perry v. Sindermann*, 408 U.S. 593, 599-601 (1972).

In light of these features of the parole system and the relationship of prisoners to it, it is not controlling that the prisoner is not absolutely entitled to release. As Professor K.C. Davis has explained, "[O]ne who lacks a 'right' to a government gratuity may nevertheless have a 'right' to fair treatment in the distribution of the gratuity." K. Davis, *Administrative Law Text* 177 (3d ed. 1971). In Kentucky, the General Assembly has provided each prisoner (except those serving a sentence of life without parole) with an opportunity for a hearing before the Parole Board prior to the Board's rendering a decision either granting or denying parole. Over sixty percent of the prisoners who go into that hearing are released on parole. The parole hearing and the undeniable release statistics are expectancies "upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. at 577. It is therefore within the ambit of interests subject to the protection of procedural due process.

The decision of the District Court implies that, for purposes of the applicability of the due process clause, there is a line of constitutional significance between revocation and release proceedings, between staying in and going back. This distinction, if not weakened by the demise of the right privilege concept, is inconsistent with a number of decisions–decided on a variety of constitutional grounds–in which this Court has clothed individuals seeking to obtain, rather than retain, some governmental benefit with the mantle of due process protections. *Cf., e.g., Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), *Konigsberg v. State Bar*, 353 U.S. 252 (1957), and *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (admission to the Bar); *Speiser v. Randall*, 357 U.S. 513 (1958) (application for tax exemption); *Simmons v. United States*, 348 U.S. 397 (1955) (application for draft exemption); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926) (application for admission to practice before Board of Tax Appeals). See also *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964) (application for a liquor license). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968). There is, to be sure, a difference between denial of release and revocation, principally with regard to the specificity of the basis for the adverse action. As is argued below, however, this difference warrants a lessened degree of protection, not an absence of protection.

As to the weight of the prisoner's interest, in both release and revocation the question for the future is the

same: incarceration or controlled liberty. The parole release decision, far from being a routine administrative determination, is nothing short of monumental for the prisoner--"a life decision," as one prisoner has put it. Citizens Inquiry on Parole and Criminal Justice, Inc., *Prison Without Walls: Report on New York Parole*, 46 (1975). See also D. Stanley, *Prisoners Among Us: The Problem of Parole*, 25-26 (in press The Brookings Institution, 1976); R. Minton (ed.), *Inside Prison American Style*, 176-93 (1971). While the parolee suffers a different sort of worsening of condition if he or she loses conditional liberty, the question is not which group of persons is worse off, but whether the prisoner's situation is also significantly worsened when release is denied.

2. Since *Morrissey v. Brewer*, and buttressed by *Wolff v. McDonnell*, no court of appeals except the court below has held to the position that due process does not apply to parole release proceedings.

The District Court dismissed the complaint on the ground that the denial of parole does not "wreak a grievous loss of liberty" so as to bring into play the Fourteenth Amendment's guarantee of procedural due process. In so doing, it relied on a number of lower federal court cases, most of which antedated *Morrissey v. Brewer*, 408 U.S. 471 (1972).[15] In *Morrissey*, the

[15]The District Court, for example, relied heavily on the lower court opinion in *Bradford v. Weinstein*, 357 F.Supp. 1127, (E.D.N.C. 1973), which was reversed on appeal. 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 44 U.S.L.W. 3372 (U.S. December 10, 1975). It also alluded to *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970), whose value as precedent against the relief sought here was gravely diminished by a subsequent Second Circuit case similarly authored by Judge Mansfield. *U.S. ex rel. Johnson v. Chairman, N.Y. State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974).

Court recognized that release on parole is not a "privilege" subject to revocation at the will of the state, but, to the contrary, was "an integral part of the penological system." *Id.* at 477. In holding that the "conditional liberty" of the parolee was protected by the due process clause, it rejected the notion "that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion." *Id.* at 483. In sum, *Morrissey* makes clear that, because release on parole provides a qualitatively different way of life from continued incarceration in prison, in any meaningful sense the parole release decision implicates interests in liberty deserving due process protection.

In the wake of *Morrissey*, numerous federal courts have held that due process was applicable to parole release decisions. "Whatever may be said for the decisions which have dealt with this and/or related questions involving due process requirements and the parole application stage, either directly or indirectly, it seems fair to say that the slate has been wiped all but clean by *Morrissey v. Brewer*." *Childs v. U.S. Board of Parole*, 371 F.Supp. 1246, 1246-47 (D.D.C. 1973), *aff'd* 511 F.2d 1270 (D.C. Cir. 1974). Indeed, all Courts of Appeals that have addressed the issue squarely in a reported opinion have held that parole release hearings qualify for due process protection.[16]

[16]In a recent ruling on this issue, the Fifth Circuit accorded no precedential value to *Scarpa v. U.S. Board of Parole*, 477 F.2d 278 (5th Cir.), *remanded for consideration of the question of mootness*, 414 U.S. 809, *vacated as moot*, 501 F.2d 992 (1973), where the due process question was discussed in dictum adversely to the position of the petitioners here. *Ridley v. McCall*, 496 F.2d 213, 214 (5th Cir. 1974).

In *United States ex. rel. Johnson v. Chairman, N.Y. State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974), the Second Circuit, directly facing the same issues presented here, held that the due process clause of the Fourteenth Amendment required the New York State Board of Parole to provide inmates with a quantum of due process protection in parole release hearings. At the threshold, the court distinguished the prior Second Circuit case of *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970), on two grounds: (1) In *Menechino*, the plaintiff primarily had sought the right to counsel and to cross examine witnesses–not the right, for example, to a written statement of reasons upon denial of parole. No consideration, therefore, was given to partial relief; and (2) *Menechino* was decided prior to *Morrissey*, which "rejected the concept that due process might be denied in parole proceedings on the ground that parole was a 'privilege' rather than a 'right'." 500 F.2d at 927.

With parole treated as an interest entitled to due process protection, the court found that:

> "[a] prisoner's interest in prospective parole, or 'conditional entitlement,' must be treated in like fashion. To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional release versus incarceration." *Id.* at 928.

Strengthening the court's view was the fact that in New York, as in Kentucky, most inmates can expect parole. Therefore, "[f]or him, with such a large stake, the Board's determination represents one of the most critical decisions that can affect his life and liberty." *Id.*

In *Bradford v. Weinstein*, 519 F.2d 728 (4th Cir. 1974), the Fourth Circuit reached the same conclusion as the Second on the question of the applicability of due process protections to parole release proceedings. "We are of the view that plaintiffs' right to consideration for parole eligibility is, at least, an aspect of liberty to which the protection of the due process clause extends." *Id.* at 731. Calling the parole release situation the converse of the in-prison disciplinary situation addressed by the Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974), see discussion, pp. 32-33, *infra*, the Court discerned no distinction in the two circumstances as far as the applicability of due process protection was concerned. "We think it would be a grievous loss for a prisoner by reason of a completely *ex parte* proceeding, and the resulting increased opportunity for committing error, to be denied parole and required to serve more of his term because the attention of the parole board was not called to data tending to indicate that parole should be granted, or for a prisoner whose incarceration has as its ultimate object the prisoner's rehabilitation to fail to know, let alone understand, why parole is denied him and learn what changes in attitudes, habits, and the like will be required if he is ever to be successful in obtaining parole. . . ." *Id.* at 732.

In *Childs v. U.S. Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974), the District of Columbia Circuit joined with the Second and Fourth in holding that "the parole decision must be guided by minimal standards of procedural due process." *Id.* at 1278. Relying on *Morrissey*, *McDonnell* and the distinct trend of recent decisions on this issue, the court ruled that the protection of an individual's interest in liberty from

possible arbitrary governmental deprivation demanded that due process apply to parole release proceedings. Cutting to the heart of the issue, the opinion stated:

> "The deprivations due to revocation of the conditional liberty enjoyed by a parolee demonstrate the serious effects of denial of parole. The applicant is deprived of the valuable features of conditional liberty described by the Court. This seems to us to place the procedures by which this deprivation is accomplished under a standard of due process. The Board holds the key to the lock of the prison. It possesses the power to grant or deny conditional liberty. In the exercise of its broad discretion, it makes judgments concerning the readiness of an inmate to conduct himself in a manner compatible with the well being of the community and himself, If the Board's decision is negative, the prisoner is deprived of conditional liberty. The result of the Board's exercise of its discretion is that an applicant either suffers a "grievous loss" or gains a conditional liberty. His interest accordingly is substantial." *Id.*

This reasoning rests on a true perspective of the relationship of the prisoner to the parole and sentencing process and, we submit, should be ratified by this Court.[17]

A final decision of this Court, we believe, clinches the question of applicability. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court held that the demands

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[17]The decisions of other circuits that have addressed the issue, although reaching similar results on statutory grounds, are informed by strong due process overtones. See *Mower v. Britton*, 504 F.2d 396 (10th Cir. 1974); *King v. United States*, 492 F.2d 1337 (7th Cir. 1974) Cf. *Fischer v. Cahill*, 474 F.2d 991 (3rd Cir. 1973). In *United States ex rel. Richerson v. Wolff*, No. 75-1241 (7th Cir. Nov. 20, 1975), the Seventh Circuit held four-square that due process applies to parole release proceedings.

of procedural due process applied to prison disciplinary proceedings involving the removal of a prisoner's good time credits. *McDonnell* makes clear that while the state is not required to provide for early release through good time credits or other means, once it has done so, it has created an important interest to which the guarantees of procedural due process attach. The Court stated:

> "It is true that the Constitution itself does not guarantee good time credit for satisfactory behavior while in prison.... But the state having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state created right is not arbitrarily abrogated." *Id.* at 557.

The same observations may be made with respect to parole, a statutorily created alternative to incarceration. As was noted in *McDonnell*: "We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state. The touchstone of due process is protection of the individual against arbitrary action of government." *Id.* at 558. It cannot be disputed that the government can act just as arbitrarily when it denies a prisoner release on parole as it can when it denies good time credit or revokes parole. If there was any doubt as to the applicability of procedural due process to parole release proceedings after *Morrissey*, that doubt has surely been dispelled by

McDonnell.[18] It would be paradoxical, indeed, in any system with a reasonable hierarchy of values, if the parole release decision escaped constitutional limitation while other actions of government–*e.g.*, the forfeiture of good time in *McDonnell*; the stigma imposed in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), or the short suspension from school in *Goss v. Lopez*, 419 U.S. 565 (1975)– are required to abide by constitutional requirements.

[18]In discussing the content of the safeguards required by prison disciplinary hearings, the Court in *McDonnell* implicitly recognized that deprivation of good time credit, which, it perceived, seriously affected the condition of a prisoner's liberty, is a lesser harm than the denial of parole. 418 U.S. 560-61.

II.

DUE PROCESS SAFEGUARDS SHOULD BE REQUIRED IN PAROLE RELEASE PROCEEDINGS DESIGNED, AT A MINIMUM, TO AFFORD PAROLE APPLICANTS: (1) A MEANINGFUL OPPORTUNITY TO BE HEARD AND TO KNOW AND REBUT FACTUAL INFORMATION UPON WHICH AN ADVERSE DECISION MAY BE PREDICATED; (2) THE RIGHT, UNDER PRESCRIBED CIRCUMSTANCES, TO BE ASSISTED BY AN ADVOCATE; AND (3) THE RIGHT TO A WRITTEN STATEMENT SPECIFYING, WITH EVIDENTIARY AND FACTUAL SUPPORT, THE REASONS FOR DENIAL.

A. It May Be Appropriate For the Court to Remand This Case For An Evidentiary Hearing Without Specifying What Process Is Due.

Once it is determined that parole release proceedings qualify for due process protection, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. at 481. The District Court considered this question by citing, with apparent approval, a number of pre-*Morrissey* cases that had rejected, as being constitutionally required, certain procedures listed in the memorandum opinion (A. 15). Having held that due process is totally inapplicable to parole release proceedings, it was, we submit, inappropriate for the District Court to reach this question, particularly without the benefit of an evidentiary hearing to ascertain the practices and procedures currently employed by the Kentucky Parole Board and the parties' respective

"interests in preserving the practice and procedures currently followed." *Bradford v. Weinstein, supra,* 519 F.2d at 733 (case remanded to District Court for evidentiary hearing on required procedures). Because of the bare state of the record here, this Court may deem it appropriate, after ruling on the threshold applicability of due process to parole release proceedings, to go no further and to remand the case to the District Court for the development of a record upon which the content of the required procedures may sharply be forged. This procedure was utilized by the Fifth Circuit in *Ridley v. McCall,* 496 F.2d 213 (5th Cir. 1974), where a procedural challenge to parole board procedures was remanded for "development of the actual facts, not just the pleaded contentions of the parties." *Id.* at 214; see *Childs v. U.S. Board of Parole,* 511 F.2d 1270, 1286 (D.C. Cir. 1974) (Leventhal, J., concurring); Amsterdam, *Perspectives On the Fourth Amendment,* 58 Minn. L. Rev. 349, 420 (1974).

The Court may be reluctant, however, to leave the matter so wholly unresolved. *First,* the action of the District Court in rejecting point by point all procedures should, perhaps, be rectified. *Second,* the issue of what process is due in parole release proceedings is being litigated in a number of cases around the country. *E.g., Franklin v. Shields,* 399 F.Supp. 309 (W.D. Va. 1975), *cert. before judgment denied,* 44 U.S.L.W. 3356 (U.S. Dec. 12, 1975). *Third,* in prior cases raising analogous due process claims, the Court has been willing to specify with considerable particularity the minimum procedures required by due process. See, *e.g., Gerstein v. Pugh,* 420 U.S. 103 (1975); *Wolff v. McDonnell, supra; Morrissey v. Brewer, supra.* For these reasons, and also because the Court may find resolution of the

threshold question less abstract if the content of the required procedures is addressed by counsel as well, this section will present petitioners' contentions as to what this "particular situation demands." *Morrissey v. Brewer,* 408 U.S. at 481.[19]

If these questions are reached, however, it is essential to bear in mind the evolving state of present knowledge about parole procedures and the realities of the parole process. As the current chairman of the U.S. Board of Parole recently observed, for many years parole "was a world of its own, sealed off from public scrutiny." Sigler, *Abolish Parole?* 39 Fed. Prob. 42, 43 (June 1975). For purposes of this case, the allegations of the complaint must be taken as an essentially true description of the operation of parole release process in Kentucky.[20] In fashioning the procedures submitted below, the petitioners have attempted to rely on the realities of the parole system as revealed by published materials. Ultimately, however, an evidentiary hearing will be necessary if matters of fact or practice, contrary

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[19]In *Gagnon v. Scarpelli, supra,* the Court took an intermediate approach between refusing to specify particular procedures and delineating with particularity the required minimum. There, the probationer's request for a *Morrissey*-type requirement that counsel be permitted at all probation revocation hearings was rejected for a case-by-case approach. Similarly, in *Morrissey v. Brewer, supra,* the Court, while spelling out a number of minimum requirements, reserved for future determination the question whether retained or appointed counsel was required, a question resolved in *Gagnon v. Scarpelli, supra.*

[20]This description is substantially corroborated in V. O'Leary and J. Nuffield, *The Organization of Parole Systems in the United States,* 54-55 (1972).

to those asserted by the petitioners, are thought to be dispositive in this phase of the due process inquiry.[21]

B. The Minimum Procedural Safeguards Submitted By the Petitioners Reflect An Accommodation Between the Severity of the Loss Suffered By A Rejected Parole Applicant, The Interests of The Parole Board in Summary Action, and The Functional Appropriateness of the Requested Procedures.

"Once it is determined that due process applies, the question remains what process is due. . . . '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action.' *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 880, 895 (1961)." *Morrissey v. Brewer*, 408 U.S. at 481. Three factors have been identified to weigh most heavily in the balancing process the Court has employed in specifying the procedures dictated by due process: "The severity of loss which the individual suffers as a result of governmental deprivation of a protected liberty or property interest, the weight of governmental interests justifying summary action and the functional

[21]The embryonic state of present knowledge about the world of parole counsels that the Court should make clear, as it did in *Wolff v. McDonnell*, 418 U.S. at 572, that whatever procedures are required are "not graven in stone" and are subject to augmentation should emerging proof regarding the competing interests of the parole applicant and the parole board and the utility of whatever procedures are required so demand.

appropriateness of the requested procedures for resolving the particular type of dispute in question." Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510, 1514 (1975). Compare *Bell v. Burson*, 402 U.S. 535, 540 (1971), with *Goldberg v. Kelly*, 397 U.S. 254, 262-63, 267 (1970). with *Gagnon v. Scarpelli, supra.* 411 U.S. at 788-91. As more fully advanced below, petitioners contend that the interests of the Board in the efficient administration of the parole process, in not denying or granting release on the basis of inaccurate or incomplete information, and in the fair treatment of its constituency so as to "enhance the changes of rehabilitation by avoiding reactions to arbitrariness," *Morrissey v. Brewer*, 408 U.S. at 484, when balanced with the interest of the prisoner in release, militate in favor of the appropriateness of the procedures detailed by petitioners below.

It is generally accepted that two main goals of a parole board are accurately predicting the risk a prisoner will pose to society and the readiness of the community to accept the prisoner back in its fold. To meet these goals on an individual basis the Kentucky Parole Board reviews an applicant's prison record, the nature and severity of the crime, the sundry contents of the file, which can contain unsolicited comments about the appliicant from the community, and conducts a brief hearing–often lasting only minutes–during which the applicant can orally advocate his cause. Immediately following the applicant's brief presentation, he or she is asked to leave the room, and the Board proceeds to make its decision. Upon reaching a decision, the Board calls the prisoner back into the hearing room and

announces its decision. Deliberation by the Board often lasts only minutes.

Given this decisionmaking process, there exist no compelling reasons why the Board—like all other administrative agencies—should be immunized from due process protections. On the contrary, the application of the safeguards urged by the petitioners would inject basic elements of fairness and rationality into an otherwise closed system, while not appreciably impinging on the necessary degree of discretion exercised by the Board in its decisionmaking process. See *Morrissey v. Brewer*, 408 U.S. at 471. In short, "[b]oth the . . . [prospective] parolee and the state have interests in the accurate finding of fact and the informed use of discretion—the [prospective] parolee to insure that his liberty is not unjustifiably taken away and the state to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." *Gagnon v. Scarpelli*, 411 U.S. at 785.

The primary interest that the Board legitimately can assert in opposition to the suggested procedures is the increased administrative burden that may result. This Court, however, has quickly put such contentions in their proper perspective. In *Breed v. Jones*, 421 U.S. 519 (1975), for example, the Court readily acknowledged "that the flexibility and informality of juvenile proceedings are diminished by the application of due process standards," but replied: "Due process standards inevitably produce such an effect, but that tells us no more than that the Constitution imposes burdens on the functioning of government and especially of law enforcement institutions." *Id.* at 535 n.15. Again, in *Gagnon v. Scarpelli, supra*, the Court recognized that

"[s]ome amount of disruption inevitably attends any new constitutional ruling." 411 U.S. at 782 n.5; *cf. Taylor v. Hayes*, 418 U.S. 488, 500 (1974) (A simple factual hearing will not interfere with the exercise of discretion). In response to similar arguments portending the impaired efficiency of governmental functioning, the Court has reiterated on a number of occasions that "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); see *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Bell v. Burson*, 402 U.S. 535, 540-41 (1971). Parole boards are not unique among government agencies in their interest in "speedy resolution" of cases, in "dealing with [applicants] informally," and in managing "very burdensome caseloads," *Goldberg v. Kelly*, 397 U.S. 254 267 (1970), yet this Court has managed, in the correctional field and elsewhere, to accommodate legitimate state interests in articulating the content of due process protection.

Backed by the above discussion, it is appropriate to spell out the precise nature of the safeguards petitioners contend are minimally mandated by due process, cognizant "that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. at 481. Petitioners do not argue that the full range of procedures suggested by *Morrissey v. Brewer, supra, Gagnon v. Scarpelli, supra* or even *Wolff v. McDonnell, supra*, must be applied in all parole release proceedings. Rather, weighing the interests involved, petitioners submit that it is necessary to select only those due process safeguards designed to insure the prisoner a *meaningful* opportunity to be heard and to know and rebut factual information upon which an adverse decision may be predicated; to apprise

the applicant of the reasons for an adverse decision and their evidentiary and factual support; and to preclude the vast possibilities of arbitrary decisionmaking by the Board. To achieve these essential ends, petitioners urge that the following procedures be adopted by the Court as the bare constitutional minima in parole release proceedings:

(1) The right to adequate notice of, and reasonable access to, factual information upon which an adverse decision may be predicated; except, in cases where law enforcement proceedings or investigation will be interfered with, personal safety is unduly jeopardized, or a clearly unwarranted invasion of privacy will result, narrowly drawn exceptions may be propounded to control access to the particular material. In such a case, a summary, which adequately apprises the prisoner of the nature and tenor of the factors that might lead to an adverse decision, may be used.

(2) At the time of each parole review, the right to appear in person for a reasonable period of time before the Board, a panel of the Board, or a Board member or hearing examiner; to submit supporting written material in advance of the hearing for inclusion in the file made available to the person conducting the hearing, and to rebut information or recommendations that may prompt a denial or postponement of parole.

(3) The right to the assistance of an advocate—either a lawyer, a law student, another inmate, a family member, a friend, or a member of the correctional staff—throughout the proceedings. This right should include an opportunity for the advocate to have access to, and consult with the prisoner about, the material referred to in paragraph (1) above. The role of counsel can be structured so as to limit participation both as to time and manner.

(4) The right to a written statement specifying, with evidentiary and factual support, the reasons for denial and, when feasible, the conditions, which if fulfilled, would likely result in favorable parole consideration at a specified future date. Although reducing the degree of procedural protection this Court has required in the correctional field in the past, *e.g., Morrissey v. Brewer, supra,* these safeguards draw sustenance from the new requirements recently laid down by the U.S. Board of Parole, 28 C.F.R. § 2.13(a), *as amended,* 40 Fed. Reg. 41332 (Sept. 5, 1975) (effective October 6, 1975), which are virtually identical in most material respects.[22] See generally Administrative Conference Recommendations 72-3, 25 Ad. L. Rev. 531 (1973).

1. Except in narrowly circumscribed cases, the prisoner should be afforded adequate notice of, and reasonable access to, factual information upon which an adverse decision might be predicated.

The opportunity to know and meet the case against a person whose vital interests are at stake is at the heart of due process protection. See, *e.g., Goldberg v. Kelly,* 397 U.S. at 269-71. In order to permit the parole applicant a reasonable opportunity to marshall facts in his or her defense, to clarify the nature of adverse information, to present evidence in his or her own behalf, and to rebut unfounded charges, either directly or with mitigating circumstances, see *Morrissey v. Brewer,* 408 U.S. at 488, a parole applicant must be

[22] A copy of the parts of these regulations pertinent to this discussion are contained in Appendix to this Brief as Exhibit C.

specifically apprised of, and afforded reasonable access to, the information the Board is considering that may prompt an adverse decision. If, for example, the Board is considering an adverse letter from a member of the community, as was pleaded in the complaint by the deceased plaintiff Bell (para. 11, A. 5), the applicant should be informed of this fact and be allowed sufficient time to develop evidence rebutting the charges. See *In re Gault*, 387 U.S. 1, 33-34, and n.54 (1967).

On one other occasion, this Court has adverted to the danger of factually erroneous or misleading information affecting prisoner interests in parole decisions. *Wolff v. McDonnell*, 418 U.S. at 565.[23] Corroborating this perception and the allegations in the complaint that "there is no organized way in which information is excluded or included in the file, organized in the file, or tested for relevancy, accuracy, reliability, bias, or prejudice" (para. 7, A. 4) are the recorded experiences of judges, scholars, and observers of the parole process. "Everybody . . . who is closely connected with the processing of offenders knows that the recording of information is not treated with any great respect." D. Gottfredson *et al., Parole Decision*

[23]A cognate concern was expressed in *Goss v. Lopez, supra:* "The concern [over unwarranted suspensions] would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. This risk of error is not at all trivial. . . ." 419 U.S. at 579-80.

Making, 49 (Nat'l Council on Crime & Delinq. 1973); *cf. Franklin v. Shields*, 399 F. Supp. 309, 313 (W.D. Va. 1975) (finding of fact that Virginia Parole Board relies on factually erroneous information never verified by the Board); *Kohlman v. Norton*, 380 F. Supp. 1073 (D. Conn. 1974) (parole denied because file erroneously indicated that applicant had used gun in committing robbery); *Leonard v. Mississippi State Probation and Parole Board*, 373 F. Supp. 699 (D. Miss. 1974) (prisoner denied parole on the basis of illegal disciplinary action); *Masiello v. Norton*, 364 F. Supp. 1133 (D. Conn. 1973) (unsupported hearsay allegation, that petitioner would ally with father if released, insufficient basis for parole denial); *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) (file material, later proven in error, led parole officers to believe that prisoner, a nonviolent sex offender, had violent tendencies. 14 Cal. 3d at 648 n.14; parole evaluation asserted that "family rejects him," when in fact prisoner had a home and employment in family business waiting for him. *Id.* at 651 n.16); *State v. Pohlabel*, 61 *N.J. Super.* 242, 160 A.2d 647 (1960) (presentence report erroneously stated, among other errors, that prisoner was under a life sentence in another jurisdiction); A. Bruce, A. Harno, E. Burgess, J. Landesco, *The Workings of the Indeterminate-Sentence Law and the Parole System in Illinois* 77 (1928) (parole board files inconsistent, ambiguous, and incomplete); D. Dressler, *Practice and Theory of Probation and Parole* 115-16 (2d ed. 1969) (files often contain incomplete and erroneous information); Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, 88, 91 (1974) (denial of parole, because of failure to utilize educational

programs, by board member unaware that no such programs then existed at unit which prisoner was assigned; misleading effect of vague and conclusory characterization of disciplinary violations); Final Report of the Joint Committee on Prison Reform of the Texas Legislature 89 (1974) ("[T]he Board has denied parole for reasons later discovered to be unfounded that might have been corrected if the inmate had had access to his files"); Hearings Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 2d. Sess. at 451 (1972) (testimony of Dr. Willard Gaylin) ("I have seen black men listed as white and Harvard graduates listed with borderline IQ's."); *Yale Project* at 834 n.107 (erroneous listing of a prisoner's brother's conviction as his).

The Board, the prisoner, and society all have a common interest in the accurate gathering of fact upon which the parole decision is based; disclosure can only further that interest. "Parole boards have as much stake in the accuracy of records as other criminal justice officials. Evidence indicates that decisions are much more likely to be documented carefully and fully when information is disclosed and when those whose interests are at stake have a chance to examine and test it." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 403 (1973).

While full and fair disclosure should be the norm,[24] petitioners recognize that there may be circumstances

[24]The National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 403 (1973), concluded that "in the average parole file little material is so sensitive that it cannot be reviewed with the inmate." Likewise, the consultant to the Administrative Conference in its study of federal parole procedures found that "most files do not seem to contain information that should not be disclosed." Johnson, *Federal Parole Procedures*, 25 Ad. L. Rev. 459, 489 (1973).

where sensitive material should not be disclosed to the prisoner. In such a case, petitioners would support narrowly drawn exceptions along the lines recently adopted by the U.S. Board of Parole in its new regulations, 28 C.F.R. § 2.57(a), *as amended*, 40 Fed. Reg. 41342 (Sept. 5, 1975).[25] These regulations permit a prisoner to review his or her file except where disclosure would jeopardize personal safety, interfere with law enforcement proceedings or investigative techniques, or constitute a clearly unwarranted invasion of personal privacy. These exceptions, designed to insure that "other important state interests" are not threatened, *Wolff v. McDonnell*, 418 U.S. at 561, should comfortably accommodate the competing interests involved.

In a case where disclosure is withheld as falling within one of the exceptions, the prisoner should be sufficiently apprised by way of a summary of the nature and tenor of the factors that might lead to an adverse decision. This summary should be as sufficiently concrete and factual as possible in order to inform the prisoner, within the bounds of the exceptions, of matters relevant to the consideration and to alert the prisoner to possible errors or misinterpretation of data. In the analogous area of applications for conscientious objector status under the selective service laws, this Court, emphasizing the need to balance conflicting interests, has required a fair summary to be supplied the applicant:

> "We did not view this provision for a fair summary as a matter of grace within the Department's discretion, but rather as an essential elelemt in the

[25]Cf. The Privacy Act of 1974, 5 U.S.C.A. §552a (j)(2).

processing of conscientious objector claims. *United States v. Nugent* [346 U.S. 1 (1953)] represented a balancing between the demands of an effective system for mobilizing the nation's manpower in time of crisis and the demands of fairness toward the individual registrant. We permitted the FBI report to remain secret because we were of the view that other safeguards in the proceeding, particularly the furnishings of a fair resume maintained the basic elements of fair play. If the balance struck in *Nugent*, is to be preserved, the registrant must receive the fair summary to which he is entitled." *Simmons v. United States*, 348 U.S. 397, 403 (1955).

If the law in an area involving as weighty a governmental interest as the mobilization of our army in wartime gives such substantial scope to due process concerns, there appears little reason why a similar or even broader scope should not obtain in this case.

2. The parole applicant is entitled to a meaningful opportunity to be heard and to rebut factual information upon which an adverse decision might be predicated.

In order for the parole applicant's right to notice and access to have substance, a meaningful hearing, allowing the applicant an opportunity to rebut unfounded or unfair material, both in advance of an at the hearing, must be held. This right is recognized in forty-five jurisdictions, including Kentucky, which grant an opportunity to be heard in person to all prisoners whose suitability for parole is being reviewed. O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime & Delinq. 378, 384 (1973). "Authorities on parole procedures regard well conducted hearings as vital to effective decisionmaking, in terms of expanding the information available to the board as well as to their effect on offenders." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* (1967). See also R. Dawson, *Sentencing* 253 (1969).

This Court should make clear, moreover, that a hearing in conformity with due process must be more than the *pro forma* ritual that occurs in many jurisdictions. In Kentucky, for example, it is reported that the Board hears approximately forty cases a day. V. O'Leary & J. Nuffield, *The Organization of Parole Systems in the United States*, 55 (1972). In a normal working day, this averages out to about seven or eight minutes per hearing, including deliberation, a dubiously adequate time period for the Board to canvass the multitude of factors the Board claims to consider in its decisionmaking.[26] Although it would be unwise to fix a

[26] A national survey of parole practices reports that in only 11 jurisdictions are less than 20 cases heard in a day; in 25, more than 30 are heard, and, in 11, 40 or more. O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime & Delinq. 385 (1973); cf. *In re Sturm*, 11 Cal. 3d 258, 262, 521 P.2d 97, 99, 113 Cal. Rptr. 361, 363 (1974) ("generally . . . no more than 10 minutes"); Official Report of the New York State Special Commission on Attica, *Attica* 96 (1972) ("average time of the hearing, including [reading the file and deliberation] is 5.9 minutes"); Citizens Inquiry on Parole and Criminal Justice, Inc., *Prison Without Walls*, 49 (1975) (in New York, "the majority take between six and twelve minutes"); Hearings Before Subcommittee No. 3 of the House Judiciary Committee on H.R. 13118, 92d Cong., 2d Sess. at 451 (1972) (average time before U.S. Board was 5 minutes); Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 Wash. U. L. Q. 243, 301 (in Kansas hearings are "two or three minutes each"); Yale Project at 821 n.48 (hearings in prior federal practice were "10 or 15" minutes). For a careful analysis supporting these observations, see D. Stanley, *Prisoners Among Us: The Problems of Parole*, Ch. 3 at 18-20 (in press, Brookings Institution 1976).

minimum time for parole release hearing, it is important for the Court to impress on parole boards that, for the hearing to be constitutionally adequate, it must be held "in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545 (1965). The essential need is to recognize that the burden of processing cases shouldered by the Board must be tempered by the prisoner's constitutional right to a meaningful hearing. If this change means a modification in the hearing practices of the Board (*e.g.*, use of hearing examiners) it will not be the first time that constitutional imperatives have affected—and ultimately benefitted—decisionmaking processes. *E.g.*, *Morrissey v. Brewer, supra.*

A further integral component of the right to a meaningful hearing is the right to rebut adverse factual evidence and present favorable evidence in one's behalf. Under the present system in Kentucky (Complaint, paras. 7 & 8, A. 4), a parole applicant's only real opportunity to present evidence in his or her own behalf comes at the very brief hearing before the Board. By the time the hearing is held, the Board presumably has reviewed the applicant's file, and, given the quickness in which a final decision is currently made following the hearing, it is likely that the Board already has tentatively made its decision. This dynamic renders the present hearing relatively useless for the prisoner, whose oral presentation would have to be nothing short of powerful to alter the tentatively reached decision of the Board.

In recognition of the imperative that "[o]rdinarily, the right to present evidence is basic to a fair hearing," *Wolff v. McDonnell*, 418 U.S. at 566, a procedure insuring that the applicant's position be taken into account by the Board at a meaningful time must be devised if the right to present evidence is to be

anything but illusory. Plaintiffs submit that due process requires that the prisoner be entitled to sufficient time in advance of the hearing to introduce whatever evidence into the file he or she deems appropriate. This procedure would allow the Board to consider this evidence in advance of the hearing rather than at the hearing as is normally the case now.

In those cases where adverse material being considered by the Board is rebutted by plausible evidence submitted by the applicant, due process should permit the applicant to present live testimony at the parole hearing. This is the practice in seventeen jurisdictions, O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime & Delinq. 378, 380 (1973), and is the recommendation of the President's Task Force on Corrections. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967). Recent studies indicate, moreover, that live presentations at parole hearings by persons other than the prisoner (whether witnesses or representatives) are helpful to parole examiners and prisoners alike. See Beck, *Effect of Representation at Parole Hearings*, 2, 12-14 (U.S. Bd. of Parole Research Unit 1974). Petitioners do not urge that this right be unqualified. If the Board should determine that live testimony by witnesses would be only marginally relevant or would be "unduly hazardous to institutional safety or correctional goals," *Wolff v. McDonnell*, 418 U.S. at 566, this safeguard can be refused, with the necessary requirement that the Board state in writing its reasons for so refusing. *Cf. Gagnon v. Scarpelli*, 411 U.S. at 791.

3. Parole applicants should have the right to be assisted by an advocate throughout the proceedings.

It is a *non sequitur* to assert that, because parole determinations are more the application of discretion than of law, prisoners have no need for an advocate in assisting them in the process. *Cf. Mempa v. Rhay*, 389 U.S 128, 135 (1967). Former Federal Prisoners Director James V. Bennett made the point well:

> "Of course the purpose of the parole hearing is not to retry the case in the technical sense of the term, and not to argue points of law and matters of that kind. Therefore, for that purpose, counsel is not needed.
>
> But on the other hand, many . . . who have come before the Parole Board are tongue-tied: they are not able to present their views in a logical straightforward manner. Many . . . are ignorant, and they just cannot say anything much in their own behalf. Therefore, it would be helpful if they did have the aid of some individual . . ." American Law Institute, *Proceedings of the 33rd Annual Meeting* 262 (1956).

These views were echoed by Paul W. Tappan, an equally respected penologist with many years of experience in a

state system, whose perceptive views are set forth in the margin.[27]

Indeed, this Court has noted the sad fact that "penitentiaries include among their inmates a high percentage of persons who are totally and functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." *Johnson v. Avery*, 393 U.S. 483, 487 (1969). Other commentators, advocating

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[27] "[P]risoners often need counsel because of their own inadequacies. Many are of less than normal intelligence. Most of them approach parole hearings partially paralyzed by fear and anxiety. Few are able to express themselves fully and effectively, sometimes because of language difficulties. Certainly there is little or no relationship between the offender's ability to make a favorable impression and his actual readiness for release.

Prisoners are generally quite ineffectual in organizing the information they should put to a parole board, important as the hearing is to them, and they have little talent for arguing to the board. To put it simply, they lack those qualities that are important to their success: qualities that are the peculiar strength of the effective advocate. For these reasons the counsel of an attorney may be quite invaluable in preparing and presenting a case to the board . . . . More specifically, it is important that there be presented effectively to the paroling authority the positive aspects of an offender's case that are relevant to his parole, matters that may be quite inadequately elucidated in the institution's records and unknown to the board, and matters in particular that the offender could not easily himself present. For example, the writer, as a parole board member, has had brought more effectively to his attention by counsel than by most parole candidates, details relating to the prisoner's family and his relationships in the home, the quality of community feeling toward the offender, the victim's attitude, and other matters." Tappan, *The Role of Counsel in Parole Matters*, 3 Prac. Law. 26-27 (Feb. 1957).

a role for counsel in parole release hearings, have pointed to the difficulties prisoners have in obtaining pertinent information only reliably available outside the prison walls. The respondents, for example, in considering such factors as "prior employment history," "attitude toward authority: Before incarceration," and "official and community attitudes toward accepting inmate back in the county of conviction," must rely on its own scarce resources in compiling this information. Counsel or counsel-substitute, often with unique access to such material, would not only aid the inmate but also the Board in compiling a complete and accurate decisional record. Another salutary role counsel might play is in insuring that purely arbitrary or biased decisions are prevented. See general, Jacob & Sharma, *Justice After Trial: Prisoners' Need For Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493, 550-57 (1970).

In recognition of these considerations, over twenty jurisdictions allow counsel to appear at parole release hearings, O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime & Delinq. 378, 386 (1973) and, by structuring the role of counsel, have

presumably found ways to guard against the remote possibility of abuse.[28] The U.S. Board of Parole, for example, has promulgated the following regulation:

> "Prisoners may be represented in hearings by a person of their choise. The function of a prisoner's representative will be to offer a statement at the conclusion of the interview of the prisoner by the

[28] "[A]llowing retained counsel at a parole release hearing does not mean that he should be allowed to convert it into a trial any more than counsel could achieve such a result at a sentencing in court." *Menechino v. Oswald*, 430 F.2d 403, 416 (2d Cir. 1970) (Feinberg, J., dissenting). In *Gagnon v. Scarpelli*, *supra*, 411 U.S. at 788, the Court raised the spectre that, due to the introduction of lawyers into probation revocation hearings, "the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate rather than continue nonpunitive rehabilitation." It is also predicted that the decisionmaking process inevitably will be prolonged. The petitioners do not minimize these concerns, and, as suggested in the text, believe a mutually satisfactory accommodation of the competing interests involved can readily be reached. We side, however, with the reasoned analysis in Professor Kadish's pathbreaking article: "In virtually all cases . . . the [parole] judgment turns upon the weightiness of considerations of retribution, moral reprobation, and community reassurance as to which in no realistic sense is there called into play the expert professional judgment of the decider. The very subjectivism of this type of judgment would appear to make altogether useful the kind of search into basic values and into their application in the circumstances of the offender toward which able counsel might readily contribute." In response to concern over counsel prolonging the process, he states: "The problems of overburdened parole boards would appear remediable by measures directed to the problem rather than by the pursuit of measures which render the work of the boards less just and adequate." Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 830 837 (1961).

> examiner panel, and to provide such additional information as the examiner may request . . . The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement." 28 C.F.R. § 2.12.

Such a "mutual accommodation" would appear to further the interests of all involved.[29]

Because "the unskilled or uneducated . . . parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining . . . of witnesses or the offering of dissecting of complex documentary evidence," *Gagnon v. Scarpelli*, 411 U.S. at 787, petitioners urge that the prospective parolee be accorded the right to be assisted by either retained counsel or chosen counsel-substitute throughout the parole release proceeding.[30] This right would comprehend access to counsel or counsel-substitute in preparing for the hearing and live representation at the hearing, with the Board free to

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[29]Commentators have suggested that it is desirable for counsel to play a greater role in release hearings. See Yale Project at 862; Administrative Conference Recommendations 72-3: *Procedures of the United States Parole Board*, 25 Ad. L. Rev. 531, 534 (1973); Comment, *Curbing Abuse in the Decision to Grant or Deny Parole*, 8 Harv. Civ. Rights-Civ. Lib. L. Rev. 419, 449-54 (1973); Comment, *Due Process: Right to Counsel in Parole Release Hearings*, 54 Iowa L. Rev. 497, 502-05 (1968).

[30]Prisoner advocates might come from a law school, a legal services program, correctional staff members, or other inmates. Cf. *Wolff v. McDonnell*, 418 U.S. at 570; cf. *Argersinger v. Hamlin*, 407 U.S. 25, 40-41 (1972) (Brennan, J., concurring). Until a more concrete factual record is available, petitioners do not urge that the right to an appointed representative be reached by the Court in this case.

structure the role of counsel–but not out of existence, *Cf. Kent v. United States*, 383 U.S. 541, 561 (1966) (These rights are meaningless–an illusion, a mockery–unless counsel is given an opportunity to function.")

4. The rejected parole applicant should have a right to a written statement specifying, with evidentiary and factual support, the reasons for denial.

Perhaps the most important due process protection lacking in Kentucky's current parole release scheme is the requirement of a written statement specifying, with evidentiary and factual support, the reasons for denial and outlining, when feasible, the conditions or requirements that must be fulfilled for the applicant to be afforded favorable parole consideration (Complaint, paras. 9 & 10, A. 5). Under the present system, a parole applicant is often left in the dark as to the specific reasons for the denial of parole and is unable to conform his or her behavior to any conditions that

might reasonably assure parole at a future date.[31] For the following reasons, the consequences of permitting the Board to exercise its presently vast discretion in reaching its ultimate decision without the anchor of written reasons are severe both for the applicant and the Board.

First, without a requirement of written reasons, there is no guarantee that the Board did not rely on illegitimate factors or unfounded or unsubstantiated factual conclusions in reaching its ultimate conclusion. *Cf. Wolff v. McDonnell*, 418 U.S. at 565. Given the number and complexity of factors often considered by

[31]As of 1972, 40 jurisdictions did not maintain a written record of the reasons for denial. O'Leary & Nuffield, *A National Survey of Parole Decisionmaking*, 19 Crime & Delinq. 378, 387 (1973). There has probably been substantial change since then, as a result of legislative, administrative, and judicial action. *E.g.*, Ch. 131, Laws of New York, 1975 §1 (1975 McKinney's Session Law News 180) N.Y. Correction Law §214 (6); *Ill. Ann. Stat.* §38-1003-3-5; 28 C.F.R. §213(d); *Childs v. U.S. Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974) *aff'd.* 371 F.Supp. 1246 (D.D.C. 1973); *U.S. ex rel. Johnson v. Chairman, N.Y. Board of Parole*, 500 F.2d 925 (2d Cir. 1974), *aff'd.* 363 F.Supp. 416 (E.D.N.Y. 1973), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974); *Mower v. Britton*, 504 F.2d 396 (10th Cir. 1974); *King v. United States*, 492 F.2d 1337 (7th Cir. 1974); *Billiteri v. U.S. Board of Parole*, 391 F.Supp. 260 (W.D.N.Y. 1975) and 385 F.Supp. 1217 (W.D.N.Y. 1974); *Cooley v. Sigler*, 381 F.Supp. 441 (D. Minn. 1974); *Craft v. Attorney General*, 379 F.Supp. 538 (M.D. Pa. 1974), *U.S. ex rel. Harrison v. Pace*, 379 F.Supp. 354 (E.D. Pa. 1973); *In re Sturm*, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 1974); *Monks v. New Jersey State Parole Board*, 58 N.J. 238, 277 A.2d 193 (1971). See generally 27 Vand. L. Rev. 1257 (1974).

the Board, it is highly unlikely that arbitrary factors sometimes do not infect the decisionmaking process.[32] Even with their expertise and experience, the members of the Board are subject to the same whims and fallibilities of all administrative decisionmakers, the difference being that the Board is dealing–next to life itself–with the ultimate human commodity–liberty.

Second, without a requirement of written reasons, an applicant has no possibility of pursuing the even limited avenues available for reviewing a wholly erroneous or arbitrary decision of the Board. *Cf. Kohlman v. Norton*, 380 F.Supp. 1073 (D. Conn. 1974). The absence of reasons essentially thwarts any judicial review, leaving to those courts that have reviewed parole board decisions the near impossible task of deciding, after the fact, why a particular decision was made. Even should an appeal procedure be established by the Board, the courts are entitled to a record, as in all other reviews of

[32]As one District Court found: "Present practices and procedures do not provide reasonable assurance that the Board's decisions on applications for parole will be based upon reasonably reliable determinations of fact. In fact, under present Parole Board practices and procedures, there exists a substantial danger of decisions which are based on clearly erroneous assumptions of fact.

. . . .The sources of said danger include evidence of filing errors and omissions, confusions stemming from instances of mistaken identity; possible reliance upon outdated and superceded information; reliance upon unsubstantiated assertions; reliance upon conflicting, unclear, and in some instances not apparently reliable psychological testing data and similar information and the like." *Childs v. U.S. Board of Parole*, 371 F.Supp. 1246, 1248 (D.D.C. 1973), *aff'd* 511 F.2d 1270 (D.C. Cir. 1974).

administrative decisions, upon which careful scrutiny of the ultimate decision can be made. *Cf. SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

Third, without a requirement of written reasons, it is humanly impossible for the Board to engage in the depth of deliberation demanded when decisions regarding liberty are made. Eminent commentators have observed the dangers to principled and reasoned decisionmaking flowing from the exercise of unbridled discretion. See K. Davis, *Discretionary Justice: A Preliminary Inquiry*, *passim* (1969). As urged by Judge Mansfield: "A reasons requirement 'promotes thought by the decider,' and compels him to 'recover the relevant points' and 'eschew irrelevancies.' " *U.S. ex rel. Johnson v. Chairman, N.Y. State Board of Parole*, 510 F.2d 925, 931 (2d Cir. 1974), *quoting* M. Frankel, *Criminal Sentences: Law Without Order*, 40-41 (1973)..

Fourth, without a requirement of written reasons, the frustration and despair immeasurably increase. There is no need to recount in these pages the often intolerable conditions a prisoner must endure. To add to these conditions the Kafkaesque nightmare of appearing before the Parole Board only to be denied without any rational explanation is reason enough for this requirement, if due process is to serve its broad, salutary purpose of assuring the individual not only actual fairness but also the appearance of fairness in contacts with the government. See *Monks v. New Jersey State Parole Board*, 58 N.J. 238, 246, 277 A.2d 193, 197 (1971); Board of Directors, National Council on Crime and Delinquency, *Parole Decisions: A Policy Statement*, 19 Crime & Delinq. 137 (1973); Kastenmeier & Eglit, *Parole Release Decisionmaking: Rehabilitation, Expertise, and the Demise of Mythology*, 22 Am. U.L. Rev. 477, 487-91 (1973).

Finally, without a requirement of written reasons, it would be extremely difficult, if not impossible, for the Board to establish a consistent set of standards to guide the applicant throughout the parole release process. "Hopefully a body of rules, principles and precedent would be established which would promote consistency by the Board . . . and provide a basis for critical reappraisal by trained experts . . . or for private groups interested in the parole system. The courts would be educated concerning the probability of parole in particular cases, an education sorely needed, since judges who exercise their power to set minimum sentences . . . are expected to play an important role in the parole process." *U.S. ex. rel. Johnson v. Chairman, N.Y. State Board of Parole, supra*, 500 F.2d at 933.[33]

Inextricably linked to the requirement of written reasons is the desirability for specific guidance to the parole applicant of the conditions or requirements that must be fulfilled to reasonably insure favorable parole consideration. As keenly perceived by one District Court: "The Board has an interest in assuring itself and society that the inmate can be rehabilitated and that the inmate's conduct conforms to the standards established by the Board. An inmate has a right to know why his parole was denied, so that, *inter alia*, he can attempt to correct his misdoings in a proper and successful manner." *Johnson v. Heggie*, 362 F.Supp. 851, 857 (D. Colo. 1973). See also *Candarini v. Attorney General*, 369 F.Supp. 1132, 1137 (E.D.N.Y. 1974). If one purpose of due process is to inject

[33]For cases revealing the criticalness of clear parole policy as a guide to judges in sentencing, see *United States v. Slutsky*, 514 F.2d 1222, 1126-30 (2d Cir. 1975); *Kortness v. United States*, 514 F.2d 167 (8th Cir. 1975).

"fundamental fairness—the touchstone of due process," *Gagnon v. Scarpelli*, 411 U.S. at 790, into an otherwise discretionary system, it would be desirable if written guidance, in addition to a requirement of written reasons for denial, be demanded of the Board.

Petitioners do not envision that the statement will constitute an exhaustive analysis of the reasons and underlying data supporting denial. Neither do we believe that a parroting of one or more of the factors currently considered by the Kentucky Board would pass muster. To inform an inmate that he was denied parole because his attitude toward authority before incarceration was poor or her emotional stability is questionable borders on meaninglessness. Only when the underlying evidentiary and factual circumstances are adequately summarized can the core purposes behind this requirement be achieved. In explaining the conditions, which if fulfilled, would likely result in future parole release, the petitioners recognize that such a requirement might not be applicable to every inmate who appears before the Board. On the other hand, it would not tax the Board appreciable more to ask, in those cases where the Board deems it can formulate appropriate conditions, that such conditions be included in the statement of reasons. Here, petitioners would encourage the conditions to be sufficiently concrete to apprise the prisoner of the particular actions he or she should take (*e.g.*, further training or schooling to insure employability, psychological counseling) prior to the next parole review. Advice such as "you need more time to get together," which was offered to the petitioner Scott (Complaint, para. 13, A. 6), should not be tolerated under the even limited requirement suggested here.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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INDEX TO APPENDIX

Appendix A:
Kentucky Parole Board Regulations

KENTUCKY PAROLE BOARD 501 KAR 1:010

TITLE 501
DEPARTMENT OF JUSTICE
BUREAU OF CORRECTIONS

Chapter 1 KENTUCKY PAROLE BOARD
CHAPTER 1
KENTUCKY PAROLE BOARD
010. Time served for parole eligibility.

501 KAR 1:010. Time served for parole eligibility.

RELATES TO: KRS 439.340(3)
PURSUANT TO: KRS 439.340, 13.082
NECESSITY AND FUNCTION: KRS 439.340 requires the Kentucky Parole Board to promulgate regulations setting forth the time an incarcerated felon is to serve before he will be eligible for parole.

Section 1. Pursuant to the authority vested in the Parole Board by KRS 439.340, the Parole Board will, as a matter of administrative policy, beginning not later than the date of final approval of this regulation, review within a twenty-five (25) month period the case of every inmate who is convicted on or after this date and who is confined in a Kentucky Correctional Facility for felons and who is serving not more than a fifteen (15) year sentence or sentences aggregating not more than fifteen (15) years.

Section 2. All persons confined after the date of final approval of this regulation who are serving sentences of fifteen (15) years or less or sentences aggregating fifteen (15) years or less, shall have their cases reviewed by the board in accordance with the schedule set out below. This schedule will not apply to sentences received as set

out in Section 6, nor will it apply to persons convicted prior to the date of final approval of these regulations. Persons convicted prior to this date will be heard for parole consideration in accordance with the regulations existing at the time of their conviction which this regulation now supersedes.

Time to be serve toward parole review	Sentence being served
4 months	1 year
5 months	More than 1 year and less than 1 1/2 years
6 months	1 1/2 years, up to and including 2 years
7 months	More than 2 years and less than 2 1/2 years
8 months	More than 2 1/2 years and less than 3 years
10 months	3 years
1 year	Over 3 years, up to and including 9 years
2 years	Over 9 years, up to and including 15 years

Reviews thereafter, as long as confinement continues, shall be at the discretion of the board.

Section 3. All persons serving a sentence or sentences aggregating more than fifteen (15) years and not more than twenty-one (21) years shall have their cases reviewed by the board after having served four (4) years of the total sentence, except for sentences received as set out in Section 6. Further reviews thereafter, as long as confinement continues, shall be at the discretion of the board.

Section 4. All persons serving a single life sentence or on multiple term sentences aggregating more than twenty-one (21) years, shall have their cases reviewed after having served six (6) years. Any persons convicted and sentenced on two (2) or more life sentences to be served consecutively, or any person convicted and sentenced on a life sentence and on a sentence or sentences for a term of years and all sentences are to be served consecutively, must serve six (6) years before having their cases reviewed by the board, except for sentences received as set out in Section 6. Further review, as long as confinement continues, shall be at the discretion of the board.

Section 5. A sentence on conviction of a felony imposed upon a confined prisoner for a crime committed prior to the date of his instant commitment, if designated to be served consecutively, shall be added to the sentence or sentences being served to determine eligibility for parole review. However, the aggregate amount of time to be served for parole review eligibility shall not exceed six (6) years. If the additional sentence is designated to be served concurrently or the commitment is silent, he shall be considered as having started to accrue parole review eligibility on the day he was committed on the first sentence.

Section 6. (1) A person receiving a sentence or sentences for a crime or crimes committed while confined in the institution or while on escape from the institution shall not begin accruing eligibility time toward parole review on the latter sentence or sentences until he has become eligible for parole on the sentence or sentences including a life sentence, for which he was originally confined.

(2) In determining parole eligibility for an inmate who has received a sentence or sentences for a crime or crimes committed while on escape or while confined in the institution, the board will require, in addition to the

amount of time required to be served for parole review on the original sentence, the service of additional time in accordance with the requirements set out in Sections 2, 3 or 4.

(3) In determining parole eligibility for an inmate who has received a sentence for an escape, the board will require, in addition to the amount of time to be served for parole review on the original sentence or sentences, and the time required to be served for any crimes committed while in the institution or while on escape, a service of one (1) year on the escape sentence if the sentence is three (3) years or more, before the inmate is eligible for parole consideration. If the sentence for escape or attempted escape is under three (3) years, the parole eligibility for the escape sentence will be determined by the chart in Section 2. In the event the escape occurs prior to the original parole review date and the inmate is returned either before or after this date, the additional time to be served for parole eligibility on the escape sentence shall not start until the day following the corrected original parole review date. If the escape occurs after the original parole review date, the additional time to be served on the escape sentence shall start on the date of his return.

(4) In the event the escape sentence and the sentence or sentences received for a crime or crimes committed while on escape or while confined in the institution are specified to be served concurrently with each other, the sentence requiring the longest time service in accordance with subsections 2 and 3 above will be the controlling factor.

(5) Even though an inmate has received a serve-out or deferment on his original sentence or sentences prior to receiving an escape sentence or any other sentence which he might subsequently receive after being given the serve-out or deferment, he will automatically be brought before the board again when, and not until, he becomes eligible for parole consideration on the additional sentence or sentences.

Section 7. A parole violator having received a sentence for a crime committed while on parole shall start accruing time credit for parole eligibility on the new sentence on the day he was returned as a parole violator.

Section 8. In keeping with the intent of the act, the Parole Board may, with the consent of the majority of the board, review the case of any inmate for parole consideration prior to his eligibility date if it appears advisable to do so. This will not be done until the reason for such action is submitted to all members in writing, along with all supporting documents, and all members will note in writing as to their desire to grant a hearing. This will then be filed in the record of the person in question and made a permanent part of his file in the central office of the Bureau of Corrections.

Section 9. The parole hearing will consist of an interview by the board, or a quorum of the board, with the inmate involved. In instances when the inmate is too ill to appear before the board, the board may, at its discretion, appoint one (1) member to interview the inmate in the hospital where he is confined and report back to the remaining members. In this instance, as in all cases, a vote by a quorum is required before action is taken. In reaching their decision, the board shall consider:

(1) Current offense;
(2) Prior record;
(3) Institutional adjustment and conduct:
(a) Disciplinary reports,
(b) Loss of good time,
(c) Work and program involvement.
(4) Attitude toward authority:
(a) Before incarceration,
(b) During incarceration.
(5) History of alcohol or drug involvement;
(6) History of prior probation, shock probation or parole violations;
(7) Educational and job skills;
(8) Prior employment history;

(9) Emotional stability;
(10) Mental capacities;
(11) Terminal illness;
(12) History of deviant behavior;
(13) Official and community attitudes toward accepting inmate back in the county of conviction;
(14) Review of parole plan:
(a) Housing,
(b) Employment,
(c) Need for community treatment and follow-up resources such as: 1. Halfway houses and residential treatment centers, 2. Comprehensive care centers, 3. Service centers, 4. Individual counselling with private social agencies and private treatment resources such as psychiatrists and psychologists.
(15) Any other factors involved that would relate to the inmate's needs and the safety of the public.

Section 10. In all cases where parole is recommended, it is based upon continued good institutional conduct through the actual release date.

Section 11. All matters relating to parole revocation shall be conducted in the following manner:
(1) Following a preliminary hearing by the staff of probation and parole, Division of Community Services, Bureau of Corrections, in which it has been established that there are reasonable grounds to believe a parole violation has taken place, a copy of the findings from the preliminary hearing and a request for a parole violation warrant are submitted to the director or assistant director of probation and parole, Division of Community Services, who reviews the findings of the preliminary hearing. If he concurs with the request for a warrant, he then submits the findings of the preliminary hearing and the request for the warrant to the chairman of the Parole Board who is authorized to issue warrants for parole violations. If the chairman, upon review, concurs that reasonable grounds exist to believe a parole violation has taken place, a warrant is issued. In cases where the person is being charged with a parole violation in that he has absconded from supervision and his whereabouts are unknown, a warrant is issued upon a sworn affidavit by the supervising parole officer with the approval of his supervisor and the approval of either the director or assistant director of probation and parole, Division of Community Services. Upon apprehension, the preliminary hearing is held; and if the hearing officer finds reasonable grounds to believe a violation has occurred, then the procedure is the same as in all other types of preliminary hearings conducted by the Division of Community Services, Probation and Parole, Bureau of Corrections, Department of Justice.

(2) Following the preliminary hearing and the return to the institution of the person who has been charged with violating the conditions of his parole, he is given a final revocation hearing before the entire board or a quorum thereof upon their next scheduled hearing date at the institution. At this hearing, the board reviews with him the charges specified on the warrant. If he agrees that the allegations are true, the board then reviews with him all other mitigating factors concerning this violation and his adjustment while under parole supervision prior to the time the violation took place before any disposition is made in his case. If the person charged with the parole violation denies the allegations on the warrant, his case is then continued until the board's next scheduled hearing date at the institution. In the interim, the person alleged to have violated the conditions of his parole is given the opportunity to designate relevant witnesses and/or documents he desires to present to the board in his behalf at the continued hearing. When necessary, the chairman of the board will issue subpoenas for the witnesses and/or documents requested by the person provided no claims for expenses incurred by these witnesses will be submitted to the board as the board has no authorization to pay such expenses. At the continued hearing, the board will also subpoena the supervising parole officer who alleged that the violation took place and any supporting witnesses in the case. Following the conclusion of the presentation of evidence by both sides at the continued hearing, the board decides whether a violation of the conditions of parole has occurred. If the board finds that a violation has occurred,

the board then considers the mitigating circumstances surrounding the violation and the adjustment of the person while under parole supervision prior to the parole violation as presented during the hearing. A disposition of the case of the parole violator is then made. (DC-Rg-6; 1 Ky.R. 348; eff. 4-9-75.)

RULES AND REGULATIONS

ADULT

[Guidelines for decisionmaking, customary total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Immigration law violations Minor theft (includes larceny and simple possession of stolen property less than $1,000). Walkaway	6 to 10 mo.	8 to 12 mo.	10 to 14 mo.	12 to 16 mo.
LOW MODERATE				
Alcohol law violations Counterfeit currency (passing/possession less than $1,000). Drugs marihuana, simple possession (less than $500) Forgery/fraud (less than $1,000) Income tax evasion (less than $10,000) Selective Service Act violations Theft from mail (less than $1,000)	8 to 12 mo.	12 to 16 mo.	16 to 20 mo.	20 to 25 mo

Appendix B:
U.S. Parole Board Guidelines for
Parole Release Consideration

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
MODERATE				
Bribery of public officials Counterfeit currency (passing/possession $1,000 to $19,999). Drugs: Marihuana, possession with intent to distribute/sale (less than $5,000). "Soft drugs", possession with intent to distribute/sale (less than to $5,00) Embezzlement (less than $20,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (single weapon—not sawed-off shotgun or machine gun). Income tax evasion ($10,000 to $50,000) Interstate transportation of stolen/forged securities (less than $20,000). Mailing threatening communications Misprision of felony Receiving stolen property with intent to resell (less than $20,000). Smuggling/Transporting of Aliens Theft/forgery/fraud ($1,000 to $19,999) Theft of motor vehicle (not multiple theft or for resale).	12 to 16 mo.	16 to 20 mo.	20 to 24 mo.	24 to 30 mo.
HIGH				
Burglary or larceny (other than embezzlement) from bank or post office. Counterfeit currency (passing/possession $20,000-$100,000). Counterfeiting (manufacturing) Drugs: Marihuana, possession with intent to distribute/sale ($5,000 or more). "Soft drugs", possession with intent to distribute/sale($500 to $5,000) Embezzlement ($20,000 to $100,000) Firearms Act, possession/purchase sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Interstate transportation of stolen/forged securities ($20,000 to $100,000). Mann Act (no force—commercial purposes) Organized vehicle theft Receiving stolen property ($20,000 to $100,000) Theft/forgery/fraud ($20,000 to $100,000)	16 to 20 mo.	20 to 26 mo.	26 to 32 mo.	32 to 38 mo.
VERY HIGH				
Robbery (weapon or threat) Drugs: "Hard drugs" (possession with intent to distribute sale) [no prior conviction for sale of "hard drugs"]. "Soft drugs", possession with intent to distribute/sale (over $5,000) Extortion Mann Act (force) Sexual act (force)	26 to 30 mo.	30 to 45 mo.	45 to 55 mo.	55 to 65 mo.

2b

3b

Appendix C:
U.S. Parole Board Regulations for Parole Release

4210 and 5005-5037, 28 CFR Chapter 1, Part 2, is amended as set forth below, effective October 6, 1975.

Approved: August 29, 1975.

Dated: August 29, 1975.

MAURICE H. SIGLER,
Chairman,
United States Board of Parole.

Sec.

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
GREATEST				
Aggravated felony (e.g. robbery, sexual act, aggravated assault)—weapon fired or personal injury. Aircraft hijacking. Drugs: "Hard drugs" (possession with intent to distribute/sale) for profit [prior conviction(s) for sale of "hard drugs"]. Espionage. Explosives (detonation). Kidnapping. Willful homicide.	(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)			

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 d (1 mo) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes.

AUTHORITY: 18 U.S.C. 4201–4210, 5001–5037; 28 CFR Part 0, Subpart v.

§ 2.1 Definitions.

(a) For the purpose of this part, the term "Board" means the United States Board of Parole; and the terms "Youth Correction Division" and "Division" each mean the Youth Correction Division of the Board.

(b) As used in this part, the term "National Appellate Board" means the Chairman, Vice Chairman, and at least

one member of the Board, all of whom also serve as National Appellate Board members in the headquarters office, i.e., Washington, D.C.

(c) All other terms used in this part shall be deemed to have the same meaning as identical or comparable terms have when those term are used in Chapter 311 of Part IV of Title 18 of the United States Code or Chapter I, Part O, Subpart V of Title 28 of the Code of Federal Regulations.

§ 2.2 Eligibility for parole, regular adult sentences.

Except as set out in the following sections, a federal prisoner wherever confined and serving a definite term or terms of over one hundred and eighty days may, in accordance with the regulations prescribed in this part, be released on parole after serving one-third of such term or terms or after fifteen years of a life sentence or a sentence of over forty-five years (18 U.S.C. 4202).

§ 2.3 Same; adult indeterminate sentences.

A Federal prisoner, other than a juvenile delinquent or a committed youth offender, who has been sentenced to a maximum term of imprisonment in excess of one year may, if the court has designated a minimum term to be served, which term may be less than, but not

more than, one-third of the maximum sentence imposed, be released on parole after serving the minimum term. In cases in which a court imposes a maximum sentence of imprisonment upon a prisoner and specifies that the prisoner may become eligible for parole at such times as the Board may determine, the prisoner may be released on parole at any time in the discretion of the Board (18 U.S.C. 4208(a)).

§ 2.4 Same; juvenile delinquents.

The Board of Parole shall release from custody, on such conditions as it deems necessary, each juvenile delinquent who has been committed, as soon as the Board is satisfied that he is likely to remain at liberty without violating the law and when such release would be in the interest of justice (18 U.S.C. 5041).

§ 2.5 Same; committed youth offenders.

The Youth Correction Division may at any time, after reasonable notice to the Director of the Bureau of Prisons, release conditionally under supervision a committed youth offender. A youth offender committed under section 5010(b) of title 18 of the United States Code to a maximum six year term shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction. A youth offender committed under section 5010

(c) of title 18 of the United States Code to a maximum term which is more than six years shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court (18 U.S.C. 5017).

§ 2.6 Same; sentences under the Narcotic Addict Rehabilitation Act.

The Narcotic Addict Rehabilitation Act provides for sentence to a maximum term for treatment as a narcotic addict. Parole may be ordered by the Board after at least six months in treatment, not including any period of time for "study" prior to final judgment of the court. Before parole is ordered by the Board, the Surgeon General or his designated representative must certify that the prisoner has made sufficient progress to warrant his release and the Attorney General or his designated representative must also report to the Board whether the prisoner should be released. Recertification by the Surgeon General prior to reparole consideration is not required (18 U.S.C. 4254).

§ 2.7 Same; sentences under the gun control statute.

A Federal prisoner sentenced under 18 U.S.C. 924(a) for violation of Federal gun control laws is considered eligible for parole at such time as the Board may determine. Prisoners sentenced under this provision are considered for parole in the same manner as if they had been sentenced under 18 U.S.C. 4208(a)(2).

§ 2.8 Same; sentences of six months or less followed by probation.

A Federal prisoner sentenced under 18 U.S.C. 3651 to serve a period of six months or less in a jail type or treatment institution, with a period of probation to follow, is not eligible for parole.

§ 2.9 Study prior to sentencing.

(a) When an adult Federal offender has been committed to an institution by the sentencing court for observation and study prior to sentencing under the provisions of 18 U.S.C. 4208(b), the report to the sentencing court is prepared and submitted directly by the United States Bureau of Prisons.

(b) The court may order a youth to be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Youth Correction Division shall report its findings to the court (18 U.S.C. 5010(e)).

§ 2.10 Date service of sentence commences.

(a) Service of a sentence of imprisonment commences to run on the date on which the person is received at the penitentiary, reformatory, or jail for service of the sentence: *Provided, however,* That any such person shall be allowed credit toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

(b) Service of the sentence of any person who is committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served shall commence to run from the date on which he is received at such jail or other place of detention.

(c) Service of the sentence of a committed youth offender or a person committed under the Narcotic Addict Rehabilitation Act commences to run and continues to run uninterruptedly from the date of conviction, except when such offender is on bail pending appeal or is in escape status.

§ 2.11 Application for parole.

(a) A prisoner, other than a juvenile delinquent, a committed youth offender, or an offender committed under the Narcotic Addict Rehabilitation Act, desiring to apply for parole shall execute such application forms as may be prescribed by the Board. Such forms shall be available at each Federal institution and shall be provided to prisoners eligible for parole. Such prisoners may waive parole consideration on a form provided for that purpose. If such a prisoner waives parole consideration, he may later supply for parole and may be heard during the next visit of the Board to the institution where he is confined, provided he has applied prior to 45 days from the first scheduled date of this visit. A prisoner who receives an initial hearing may not waive any subsequent review hearing scheduled by the Board except as provided in § 2.16(c). New parole applications are not necessary for such review hearings.

(b) A prisoner who is required to apply before receiving a parole hearing but who fails to submit either an application or a waiver form shall be referred to the Board's representatives by the chief executive officer of the institution. The prisoner shall then receive an explanation of his right to apply for parole at a later date.

(c) Prisoners committed under the Federal Juvenile Delinquency Act. The Youth Correction Act, and the Narcotic Addict Rehabilitation Act shall be considered for parole without application

and may not waive parole consideration.

(d) Notwithstanding the above provisions relating to parole application, all prisoners prior to initial hearing shall be provided with an inmate background statement by the Bureau of Prisons for completion by the prisoner.

§ 2.12 Hearing procedure.

(a) Prisoners shall be given written notice of the time and place of the hearing described in §§ 2.13 and 2.14. Prisoners may be represented at hearings by a person of their choice. The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner panel shall request. Interested parties who oppose parole may select a representative to appear and offer a statement. The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement.

(b) No interviews with the Board, or any representative thereof, shall be granted to a prisoner unless his name is docketed for a hearing in accordance with Board procedures. Hearings shall not be open to the public, and the records

§ 2.13 Initial hearing.

(a) An initial hearing shall be conducted by a panel of two hearing ex-

aminers designated by the Board. The examiner panel shall discuss with the prisoner his offense severity rating and salient factor score as described in § 2.20, his institutional conduct, and, in addition, any other matter the panel may deem relevant. At the conclusion of the hearing, the examiner panel shall inform the prisoner of its tentative decision, and, if parole is denied, of the reasons therefor.

(b) In accordance with § 2.18 the reasons for parole denial may include, but are not limited to, the following reasons, with further specification where appropriate:

(1) Release at this time would depreciate the seriousness of the offense committed and would thus be incompatible with the welfare of society.

(2) There does not appear to be a reasonable probability at this time that the prisoner would live and remain at liberty without violating the law.

(3) The prisoner has (a serious) (repeated) disciplinary infraction(s) in the institution.

(4) Additional institutional treatment is required to enhance the prisoner's capacity to lead a law-abiding life.

(c) In lieu of or in combination with the reasons in paragraph (b) (1) and (2) of this section the prisoner after initial hearings shall be furnished a guideline

evaluation statement which includes the prisoner's salient factor score and offense severity rating as described in § 2.20, as well as the reasons for a decision to continue the prisoner for a period outside the range indicated by the guidelines.

(d) Written notification of the decision or referral under § 2.17 or § 2.24 shall be mailed or transmitted to the prisoner within fifteen working days of the date of the hearing except in emergencies. If parole is denied, the prisoner shall also receive in writing as a part of the decision, the reasons therefor.

§ 2.14 Review hearings.

All hearings subsequent to the initial hearing shall be considered as review hearings. Review hearings by examiners designated by the Board shall be scheduled for each Federal institution, and prisoners shall appear for such hearings in person, except for the following cases:

(a) During the month preceding a regularly scheduled review hearing, a case may be reviewed on the record by an examiner panel (including a current institutional progress report). If the decision is to grant parole, no hearing shall be conducted.

(b) A prisoner sentenced under the Youth Corrections Act or Federal Juvenile Delinquency Act or a prisoner sentenced to a maximum term of more than

18 months under 18 U.S.C. 4208(a)(2) or 924(a) shall not be continued past one-third of his maximum sentence at an initial hearing without further hearing upon completion of one-third of his maximum sentence.

(c) Notification of review decisions shall be given as set forth in § 2.13(d). No prisoner shall be continued for more than three years from the time of last hearing without further review.

§ 2.15 Petition for consideration of parole prior to date set at hearing.

When a prisoner has met the minimum time of imprisonment required by law, the Bureau of Prisons may petition the responsible Regional Director for reopening the case under § 2.28 and consideration of parole prior to the date set by the Board at the initial or review hearing. The petition must show cause why it should be granted, i.e., an emergency, hardship, or the existence of other extraordinary circumstances that would warrant consideration of early parole.

§ 2.16 Parole of prisoner in state or territorial institution.

(a) Any person who has been convicted of any offense against the United States which is punishable by imprisonment but who is confined therefor in a state reformatory or other state or territorial institution, shall be eligible for

parole by the Board on the same terms and conditions by the same authority, and subject to recommittal for the violation of such parole, as though he were confined in a Federal penitentiary, reformatory, or other correctional institution.

(b) Federal prisoners serving concurrent state and Federal sentences in state, local, or territorial institutions shall be furnished upon request parole application forms. Upon receipt of the application and any supplementary classification material submitted by the institution, the parole decision shall be made by an examiner panel of the appropriate region on the record only.

(c) Prisoners who are serving federal sentences exclusively but who are being boarded in state, local or territorial institutions may be considered for parole on the record only, provided they sign a waiver of their right to a personal hearing. If such a prisoner does not waive a personal hearing, he may be transferred by the Bureau of Prisons to a Federal institution where he will be considered for parole at the next visit by an examiner panel of the Board.

§ 2.17 Original jurisdiction cases.

(a) A Regional Director may designate certain cases as original jurisdiction

cases. The Regional Director shall then forward the case with his vote, and any additional comments he may deem germane, to the National Directors for decision. Decisions shall be based upon the concurrence of three votes with the appropriate Regional Director and each National Director having one vote. Additional votes, if required, shall be cast by the other Regional Directors on a rotating basis as established by the Chairman of the Board.

(b) The following criteria will be used in designating cases as original jurisdiction cases:

(1) Prisoners who have committed serious crimes against the security of the Nation, e.g., espionage, or aggravated subversive activity.

(2) Prisoners whose offense behavior (A) involved an unusual degree of sophistication or planning or (B) was part of a large scale criminal conspiracy or a continuing criminal enterprise.

(3) Prisoners who have received national or unusual attention because of the nature of the crime, arrest, trial, or prisoner status, or because of the community status of the offender or his victim.

(4) *Long-term sentences.* Prisoners sentenced to a maximum term of forty-five years (or more) or prisoners serving life sentences.

§ 2.18 Granting of parole.

The granting of parole rests in the discretion of the Board of Parole. The Board may parole a prisoner who is otherwise eligible if (a) in the opinion of the Board such release is not incompatible with the welfare of society; (b) he has observed substantially the rules of the institution in which he is confined; and (c) there is a reasonable probability that he will live and remain at liberty without violating the laws (18 U.S.C. 4203(a)).

§ 2.19 Consideration by the Board.

In the exercise of its discretion, the Board generally considers some or all of the following factors and such others as it may deem appropriate:

(a) Sentence data:

(1) Type of sentence;

(2) Length of sentence;

(3) Recommendations of judge, U.S. Attorney, and other responsible officials.

(b) Present offense:

(1) Facts and circumstances of the offense;

(2) Mitigating and aggravating factors;

(3) Activities following arrest and prior to confinement, including adjustment on bond or probation, if any.

(c) Prior criminal record:

(1) Nature and pattern of offenses;

(2) Adjustment to previous probation, parole, and confinement;

(3) Detainers.

(d) Changes in motivation and behavior:

(1) Changes in attitude toward self and others;

(2) Reasons underlying changes;

(3) Personal goals and description of personal strength or resources available to maintain motivation for law abiding behavior.

(e) Personal and social history:

(1) Family and marital history;

(2) Intelligence and education;

(3) Employment and military experience;

(4) Physical and emotional health.

(f) Institutional experience:

(1) Program goals and accomplishments:

(i) Academic;

(ii) Vocational education, training or work assignments;

(iii) Therapy.

(2) General adjustment:

(i) Inter-personal relationships with staff and inmates;

(ii) Behavior. including misconduct.

(g) Community resources, including release plans:

(1) Residence; live alone, with family or others;

(2) Employment, training, or academic education;

(3) Special needs and resources to meet them.

(h) Results of scientific data and tools;

(1) Psychological tests and evaluations;

(2) Statistical parole experience tables (salient factor score).

(i) Paroling policy guidelines as set forth in § 2.20;

(j) Comments by hearing examiners, evaluative comments supporting a decision, including impressions gained from the hearing.

§ 2.20 Paroling policy guidelines; statement of general policy.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Board of Parole has adopted guidelines for parole release consideration.

(b) These guideline indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for the cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement may be considered for earlier release.

(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) These guidelines do not apply to parole revocation or reparole considerations. The Board shall review the guidelines periodically and may revise or modify them at any time as deemed appropriate.

§ 2.21 Reports considered.

Decisions as to whether a parole shall be granted or denied shall be determined on the basis of the application, if any, submitted by the prisoner, together with the classification study and all reports assembled by all the services which shall

Salient Factor Score

Case name_____ Register No_____

Item A_____ ☐
No prior convictions (adult or juvenile) = 2
One or two prior convictions = 1
Three or more prior convictions = 0

Item B_____ ☐
No prior incarcerations (adult or juvenile) = 2
One or two prior incarcerations = 1
Three or more prior incarcerations = 0

Item C_____ ☐
Age at first commitment (adult or juvenile) 18 years or older = 1
Otherwise = 0

Item D_____ ☐
Commitment offense did not involve auto theft = 1
Otherwise = 0

Item E_____ ☐
Never had parole revoked or been committed for a new offense while on parole = 1
Otherwise = 0

Item F_____ ☐
No history of heroin or opiate dependence = 1
Otherwise = 0

Item G_____ ☐
Has completed 12th grade or received GED (prior to this commitment) = 1
Otherwise = 0

Item H_____ ☐
Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
Otherwise = 0

Item I_____ ☐
Release plan to live with spouse and/or children = 1
Otherwise = 0

Total score_____ ☐

ıave been active in the development of he case. These reports may include the eports by the prosecution officers, re-orts by or for the sentencing court, ecords from the Federal Bureau of In-estigation, reports from the officials in ach institution in which the applicant hall have been confined, all records of ocial agency contacts, and all corre-pondence and such other records as are ecessary or appropriate for complete resentation of the case. Before making decision as to whether a parole should e granted or denied in any particular ase, the Board will consider all avail-ble relevant and pertinent information oncerning the case. The Board encour-ges the submission of such information y interested persons.

2.22 Communication with the Board.

Attorneys, relatives, or interested par-es wishing a personal interview to dis-uss a specific case with a representative f the Board of Parole must submit a ritten request to the appropriate re-ional office setting for the nature of he information to be discussed. Such ersonal interview may be conducted by taff personnel in the regional offices. ersonal interviews, however, shall not e held by an examiner or member of he Board, except under the Board's ppeals procedures.

§ 2.23 Delegation to hearing examiners.

(a) There is hereby delegated to hear-ing examiners the authority to make tentative decisions relative to the grant-ing or denial of parole, or reparole and revocation or reinstatement of parole or mandatory release and to fix conditions of parole.

(b) Hearing examiners shall function as two-man panels and the concurrence of both examiners shall be required for their decision. In the event of a split decision by the panel, the appropriate regional Administrative Hearing Exam-iner shall cast the deciding vote.

(c) When a hearing examiner panel proposes to make a decision which falls outside of explicit guidelines for parole decision-making promulgated by the Board, the case shall be reviewed by the appropriate regional Administrative Hearing Examiner. When an Adminis-trative Hearing Examiner does not con-cur in a decision of an examiner panel to set a parole effective date or continu-ance outside the Board's guidelines he may with the concurrence of the Re-gional Director modify the date to the nearest limit of the guidelines.

(d) In the event the Administrative Hearing Examiner is serving as a mem-ber of a hearing examiner panel or is otherwise unavailable, cases requiring his action under paragraphs (b) and (c)

of this section will be referred to another hearing examiner.

(e) A tentative decision of a hearing examiner panel, subject to the provisions of § 2.23(c), shall become effective upon review and docketing at the Regional Office unless action is initiated by the Regional Director under § 2.24.

§ 2.24 Review of panel decision by the Regional Director and the National Directors.

A Regional Director may review the decision of any examiner panel and refer this decision, prior to written notification to the prisoner, with his recommendation and vote to the National Directors for reconsideration and any action deemed appropriate. Written notice of this reconsideration action shall be mailed or transmitted to the prisoner within fifteen working days of the dat . of the hearing. The Regional Director and each National Director shall have one vote and decisions shall be based upon the concurrence of two votes.

§ 2.25 Appeal of hearing panel decision.

(a) A prisoner may file with the responsible Regional Director a written appeal of a decision of a hearing examiner panel or a decision under § 2.24 to grant, deny or revoke parole or to revoke mandatory release. This appeal must be filed on a form provided for that purpose

within thirty days from the date of entry of such decision. The appeal shall be considered by the Regional Director who may affirm the decision, order a new institutional hearing, order a regional appellate hearing, reverse the decision, or modify a continuance or the effective date of parole. Reversal of a decision or the modification of such a decision by more than one hundred eighty days, whether based upon the record or following a regional appellate hearing, shall require the concurrence of two out of three Regional Directors. Appellate decisions requiring a second or additional vote shall be referred to other Regional Directors on a rotating basis as established by the Chairman.

(b) Regional appellate hearings shall be held at the regional office before the Regional Director. Attorneys, relatives and other interested parties who wish to appear must submit a written request to the Regional Director stating their relationship to the prisoner and the general nature of the information they wish to present. The Regional Director shall determine if the requested appearances will be permitted. The prisoner shall not appear personally.

(c) If no appeal is filed within thirty days of entry of the original decision, this decision shall stand as the final decision of the Board.

(d) Appeals under this section may be based only upon the following grounds:

(1) The reasons given for a denial or continuance do not support the decision; or

(2) There was significant information in existence but not known at the time of the hearing.

§ 2.26 Appeal to National Appellate Board.

(a) A prisoner may file a written appeal of the Regional Director's decision under § 2.25 to the National Appellate Board on a form provided for that purpose within thirty days after the entry of the Regional Director's written decision. The National Appellate Board may, upon the concurrence of two members, affirm, modify, or reverse the decision, or order a rehearing at the institutional or regional level.

(b) The bases for such appeal shall be the same as for a regional appeal as set forth in § 2.25(d). However, any matter not raised on a regional level appeal may not be raised on appeal to the National Appellate Board.

(c) Decisions of the National Appellate Board shall be final.

§ 2.27 Appeal of original jurisdiction cases.

(a) Cases decided under the procedure specified in § 2.17 may be appealed within thirty days of the entry of the decision on a form provided for this purpose. Attorneys, relatives, and other interested parties who wish to submit written information in support of a prisoner's appeal should send such information to the National Appellate Board Executive, United States Board of Parole, 320 First Street NW., Washington, D.C. 20537. Appeals of original jurisdiction cases shall be reviewed by the entire Board at its next quarterly meeting. A quorum of five members shall be required and all decisions shall be by majority vote. The Chairman shall vote on the decision only in the absence of a member. This appellate decision shall be final.

(b) Attorneys, relatives, or other interested parties who wish to speak for or against parole at such consideration must submit a written request to the Chairman of the Board stating their relationship to the prisoner and the general nature of the material they wish to present. The Chairman shall determine if the requested appearances will be permitted.

(c) If no appeal is filed within thirty days of the entry of the decision under § 2.17, this decision shall stand as the final decision of the Board.

(d) The bases for this appeal shall be the same as for a regional appeal as set forth in § 2.25(d).

§ 2.28 Reopening of cases.

Notwithstanding the appeal procedure of § 2.25 and § 2.26, the appropriate Regional Director may on his own motion reopen a case at any time upon the receipt of new information of substantial significance and may then take any action authorized under the provisions and procedures of § 2.25. Original jurisdiction cases may be reopened upon the motion of the appropriate Regional Director under the procedures of § 2.17.

§ 2.29 Withheld and forfeited good time.

(a) Section 4202 of title 18 of the United States Code permits Federal prisoners to be paroled if they have observed the rules of the institution in which they are confined and if they are otherwise eligible for parole. Any forfeiture of statutory good time shall be deemed to indicate that the prisoner has violated the rules of the institution to a serious degree, and a parole will not be granted in any such case in which such a forfeiture remains effective against the prisoner concerned. Any withholding of statutory good time shall be deemed to indicate that the prisoner has engaged in some less serious breach of the rules of the institution. Nevertheless, parole will not usually be granted unless and until such good time has been restored.

(b) Neither a forfeiture of good time nor a withholding of good time shall bar a prisoner from applying for and receiving a parole hearing.

(c) The above restrictions shall not apply, however, to the forfeiture or withholding of *extra good time* which is granted because of meritorious behavior. Parole may be ordered without regard to a prisoner's status insofar as *extra good time* is concerned, although the reasons for any forfeiture or withholding will be included among the other factors used in making the parole decision.

§ 2.30 Release on parole.

(a) A grant of parole shall not be deemed to be effective until a certificate of parole has been delivered to the prisoner.

(b) Parole release dates generally will not be set more than six months from the date of the parole hearing. Exceptions may be made in extraordinary situations or when necessary to permit an adequate period of residence in a Community Treatment Center. Such residence in a Community Treatment Center shall not generally exceed one hundred and twenty days. An effective date of parole shall not be set for a Saturday, Sunday, or a legal holiday.

(c) When an effective date of parole has been set by the Board, release on

that date shall be conditioned upon continued good conduct by the prisoner and the completion of a satisfactory plan for parole supervision. The appropriate Regional Director may, on his own motion, reconsider any case prior to release and may reopen and advance or retard a parole date. A parole grant may be retarded for up to one hundred and twenty days without a hearing for development and approval of release plans.

§ 2.31 False or withheld information.

All paroles are ordered on the assumption that information from the prisoner has not been fraudulently given or withheld from the Board. If evidence comes to the attention of the Board that a prisoner willfully concealed or misrepresented information deemed significant, the Regional Director may schedule a hearing to determine whether parole should be revoked or rescinded. Such a hearing shall be conducted in accordance with the procedure set out in § 2.37 (b) (2).

§ 2.32 Committed fines.

In any case in which a prisoner shall have had a fine imposed upon him by the committing court for which he is to stand committed until it is paid or until he is otherwise discharged according to law, such prisoner shall not be released

on parole or mandatory release until payment of the fine, or until the fine commitment order is discharged according to law as follows:

(a) An indigent prisoner may make application to a U.S. Magistrate in the District wherein he is incarcerated or to the chief executive officer of the institution setting forth, under institutional regulations, his inability to pay such fine; if the magistrate or chief executive officer shall find that the prisoner, having no assets exceeding $20 in value except such as are by law exempt from being taken on execution for debt, is unable to pay the fine, and if the prisoner takes a prescribed oath of indigency, he shall be discharged from the commitment obligation of the committed fine sentence.

(b) If the prisoner is found to possess assets in excess of the exemption in paragraph (a) of this section, nevertheless if the chief executive officer of the institution or U.S. Magistrate shall find that retention of all of such assets is reasonably necessary for his support or that of his family, upon taking of the prescribed oath concerning his assets the prisoner shall be discharged from the commitment obligation of the committed fine sentence. If the chief executive officer of the in titution or U.S. Magistrate shall find that retention by the prisoner of

any part of his assets is reasonably necessary for his support or that of his family, the prisoner upon taking of the prescribed oath concerning his assets, shall be discharged from the commitment obligation of the committed fine sentence upon payment on account on his fine of that portion of his assets in excess of the amount found to be reasonably necessary for his support or that of his family.

(c) Discharge from the commitment obligation of any committed fine sentence does not discharge the prisoner's obligation to pay the fine as a debt due the United States.

§ 2.33 Parole to detainers; statement of policy.

The policy of the Board with regard to parole to detainers is in general accord with the principles recommended by the Association of Administrators of the Interstate Compact for the Supervision of Parolees and Probationers:

(a) The status of detainers held against prisoners in Federal institutions will be investigated, so far as is reasonably possible, prior to parole hearings.

(b) In appropriate cases summary information regarding such prisoner will be provided to state or local authorities. The Board urges institution officials to provide such information.

(c) Where the detainer is not lifted, the Board may grant parole to such detainer if a prisoner is considered in other respects to be a good parole risk. Ordinarily, however, the Board will grant parole to such detainer only if the status of that detainer has been investigated.

(d) The Board will cooperate in working out arrangements for concurrent supervision with other jurisdictions where it is feasible and where release on parole appears to be justified.

(e) The presence of a detainer is not of itself a valid reason for the denial of parole. It is recognized that where the prisoner appears to be a good parole risk, there may be distinct advantage in granting parole despite a detainer.

§ 2.34 Parole to local or immigration detainers.

(a) When a state or local detainer is outstanding against a prisoner whom the Board wishes to parole, the Board may order either of the following:

(1) "Parole to the actual physical custody of the detaining authorities only." In this event, release is not to be effected except to the detainer. When such a detainer is withdrawn, the prisoner is not to be released unless and until the Board makes a new order of parole.

(2) "Parole to the actual physical custody of the detaining authorities or an

approved plan." In this event, release is to be effected even though the detainer might be withdrawn, providing there is an acceptable plan for community supervision.

(b) When the Board wishes to parole a prisoner subject to a detainer filed by Federal immigration officials, the Board may order one of the following:

(1) "Parole for deportation only." In this event, release is not to be effected unless immigration officials make full arrangements for deportation immediately upon release.

(2) "Parole to the actual physical custody of the immigration authorities only." In this event, release is not to be effected unless immigration officials take the prisoner into custody—regardless of whether or not deportation follows.

(3) "Parole to the actual physical custody of the immigration authorities or an approved plan." In this event, release is to be effected regardless of whether or not immigration officials take the prisoner into custody, providing there is an acceptable plan for community supervision.

(c) As used in this section "parole to a detainer" means release to the "physical custody" of the authorities who have lodged the detainer. Temporary detention in a jail in the county where the institution of confinement is located does

not constitute release on parole. If the authorities who lodged the detainer do not take the prisoner into custody for any reason, he shall be returned to the institution to await further order from the Board.

§ 2.35 Mental competency proceedings.

(a) Whenever a prisoner or parolee is scheduled for a hearing in accordance with the provisions of this part and reasonable doubt exists as to his mental competency, i.e., his ability to understand the nature of and participate in scheduled proceedings, a preliminary hearing to determine his mental competency shall be conducted by a panel of hearing examiners or other official(s) (including a U.S. Probation Officer) designated by the Board of Parole.

(b) At the competency hearing, the hearing examiners or designated official(s) shall receive oral or written psychiatric testimony and other evidence that may be available. A preliminary determination of the prisoner's mental competency shall be made upon the testimony, evidence, and personal observations of the prisoner. If the examiner panel or designated official(s) determines that the prisoner is mentally competent, the previously scheduled hearing shall be held. If they determine that the

prisoner is not mentally competent, the previously scheduled hearing shall be temporarily postponed.

(c) Whenever the hearing examiners or designated official(s) determine that a person is incompetent and postpone the previously scheduled hearing, they shall forward the record of the preliminary hearing with their findings to the Regional Director for review. If the Regional Director concurs with their findings, he shall order the temporarily postponed hearing to be postponed indefinitely until such time as it is determined that the prisoner or parolee has recovered sufficiently to understand the nature of and participate in the proceedings and, in the case of a parolee, may order such parolee committed to a Bureau of Prison's facility for further examination. In any such case, the Regional Director shall require a progress report at least every six months on the mental health of the prisoner. When the Regional Director determines that the prisoner has recovered sufficiently, he shall reschedule the hearing for the earliest possible date.

(d) If the Regional Director disagrees with the findings of the hearing examiners or designated official(s) as to the mental competency of the prisoner, he shall take such action as he deems appropriate.

§ 2.36 Release plans.

(a) A grant of parole is conditioned upon the approval of release plans by the Regional Director. In general, the following factors should be present before a prisoner is released after parole has been granted:

(1) The probation officer to whom the releasee is assigned may, in his discretion, require that there be available to the releasee an adviser who is a responsible, reputable, and law-abiding citizen living in or near the community in which the releasee will reside. The adviser should act as a source of advice for the releasee relative to community adjustment. The adviser may provide special services such as vocational placement, personal counsel, or referral to community agencies. The adviser is expected to report to the probation officer any law violation or serious misconduct on the part of the releasee. The adviser may be required by the probation officer to countersign the parolee's monthly supervision report to indicate actual contact with the parolee.

(2) There should be satisfactory evidence that the prospective parolee will be legitimately employed following his release; and

(3) There should be satisfactory assurance that necessary aftercare will be available to a parolee who is ill or who

has some other problem which requires special care.

(b) Generally, parolees will be released only to the place of their legal residence unless the Board is satisfied that another place of residence will serve the public interest more effectively or will improve the probabilities of the applicant's readjustment.

§ 2.37 Rescission of parole.

(a) When an effective date of parole has been set by the Board, release on that date shall be conditioned upon continued good conduct by the prisoner. If a prisoner has been granted parole and has subsequently been charged with institutional misconduct sufficient to become a matter of record, the Regional Director shall be advised promptly of such misconduct. The prisoner shall not be released until the institution has been notified that no change has been made in the Board's order to parole.

(1) Upon receipt of information that a prisoner has violated the rules of the institution, the Regional Director may retard the parole grant for up to sixty days without a hearing or may retard the parole grant and schedule the case for a rescission hearing. If the prisoner was confined in a federal prison at the time of the order retarding parole, the rescission hearing shall be scheduled for

the next docket of parole hearings at the institution. If the prisoner was residing in a federal community treatment center or a state or local halfway house, the rescission hearing shall be scheduled for the first docket of parole hearings after return to a federal institution. When the prisoner is given written notice of the Board action regarding parole, he shall be given notice of the charges of misconduct to be considered at the rescission hearing. The purpose of the rescission hearing shall be to determine whether rescission of the parole grant is warranted. At the rescission hearing the prisoner may be represented by a person of his choice and may present documentary evidence.

(2) An institution discipline committee hearing conducted by the institution resulting in a finding that the prisoner has violated the rules of his confinement, may be relied upon by the Board as conclusive evidence of institutional misconduct.

(3) If the parole grant is rescinded, the prisoner shall be furnished a written statement of the findings of misconduct and the evidence relied upon.

(b) (1) Upon receipt of new information adverse to the prisoner regarding matters other than institutional misconduct, the Board acting upon the procedures of § 2.17 may retard a previ-

ously granted parole and schedule the case for an institutional review hearing on the next docket of parole hearings or at the first docket of parole hearings following return to a federal institution.

(2) The prisoner shall be given notice of the nature of the new adverse information upon which the rescission consideration is to be based. The hearing shall be conducted in accordance with the procedures set out in §§ 2.12 and 2.13. The purpose of the hearing shall be to determine if the parole grant should be rescinded or if a new parole date should be established.

§ 2.38 Sponsorship of parolees; statement of policy.

It is the policy of the Youth Corrections Division to cooperate with groups desiring to serve as sponsors of parolees. In all cases, sponsors shall serve under the direction of and in cooperation with the probation officers to whom the parolees are assigned.

§ 2.39 Mandatory release in the absence of parole.

A prisoner shall be mandatorily released by operation of law at the end of the sentence imposed by the court less such good time deductions and extra good time deductions as he may have earned through his behavior and efforts

at the institution of confinement. He shall be released as if on parole, under supervision until the expiration of the maximum term or terms for which he was sentenced less one hundred eighty days. Insofar as possible, release plans shall be completed before the release of any such prisoner.

§ 2.40 Same; youth offenders.

A prisoner committed under the Youth Corrections Act must be initially released conditionally under supervision not later than two years before the expiration of the term imposed by the court.

§ 2.41 Reports to police departments of names of parolees; statement of policy.

Names of parolees under supervision will not routinely be furnished to a police department of a community, except as required by law. All such notifications are to be regarded as confidential.

§ 2.42 Community supervision by United States Probation Officers.

(a) Pursuant to section 3655 of title 18 of the United States Code, United States Probation Officers are required to provide such parole services as the Attorney General may request. The Attorney General has delegated his authority in this regard to the Board (28 CFR 0.126(b)). In conformity with the foregoing, proba-

tion officers function as parole officers and provide supervision to parolees and mandatory releasees under the Board's jurisdiction.

(b) A parolee or mandatory releasee may be transferred to a new district of supervision with the permission of the probation officers of both the transferring and receiving district, provided such transfer is not contrary to instructions from the Board.

§ 2.43 Duration of period of community supervision.

(a) Any prisoner, with the exception of those sentenced prior to June 29, 1932, who is released under the provisions of laws relating to parole, shall continue until the expiration of the maximum term or terms specified in his sentence without deductions of allowance for good time. Prisoners sentenced prior to June 29, 1932, shall receive reductions in their maximum term or terms of imprisonment for such good time allowances as may be authorized by law.

(b) The Regional Director may discharge from supervision prior to the normal expiration date as provided in § 2.46(b), but the sentence is not thus commuted and such a parolee may be reinstated to supervision or retaken on the basis of a violator warrant.

§ 2.44 Conditions of release.

The conditions of release are printed on the release certificate and are binding regardless of whether the releasee signs the certificate. The Board, or a member thereof, may add special conditions or modify the conditions of release at any time.

§ 2.45 Travel by parolees and mandatory releasees.

(a) The probation officer may approve travel outside the district without approval of the Regional Director in the following situations:

(1) Vacation trips not to exceed thirty days,

(2) Trips, not to exceed thirty days, to investigate reasonably certain employment possibilities,

(3) Recurring travel across a district boundary, not to exceed fifty miles outside the district, for purposes of employment, shopping, or recreation.

(b) Specific advance approval by the Regional Director is required for other travel, including travel outside the continental limits of the United States, employment more than fifty miles outside the district, and vacations exceeding thirty days. A special condition imposed by the Regional Director prohibiting certain travel shall supersede any general rules relating to travel as set forth above.

§ 2.46 Supervision reports, modification and discharge from supervision.

(a) All parolees and mandatory releases shall make such reports to the United States Probation Officers to whom they have been assigned as may be required by the Board or Probation Officers. Probation Officers shall submit summary reviews of the progress of parolees and mandatory releasees according to Board policy. On the basis of summary reviews of the progress of parolees, the Regional Director may modify the reporting requirement of parolees or releasees.

(b) After the parolee or mandatory releasee has been under supervision for at least one year, the Regional Director may, in his discretion, permit the parolee to submit a written report to his probation officer on a less frequent basis than once a month. After a period of such reduced reporting the Regional Director may further order that the parolee be discharged from all supervision by the Probation Officer. In the latter instances, a parolee may be reinstated to supervision or a warrant may be issued for him as a violator at any time prior to the expiration of the sentence or sentences imposed by the court. Other modification in the reporting requirements may be made by the Regional Director at any time during the parolee's term.

§ 2.47 Modification and discharge from supervision; youth offenders.

A committed youth offender may remain under supervision until the expiration of his sentence or he may be released from supervision or unconditionally discharged at any time after one year of continuous supervision on parole.

§ 2.48 Setting aside conviction.

When an unconditional discharge has been granted to a youth offender prior to the expiration of his maximum term of sentence, his conviction shall be automatically set aside and the Regional Director shall issue to the youth offender a certificate to that effect.

§ 2.49 Revocation of parole or mandatory release.

(a) If a parolee or mandatory releasee violates any of the conditions of his release, and satisfactory evidence thereof is presented to the Board, or a member thereof, a warrant may be issued and the offender returned to an institution. Warrants shall be issued or withdrawn only by the Board, or a member thereof.

(b) A warrant for the apprehension of any parolee shall be issued only within the maximum term or terms for which the prisoner was sentenced.

(c) A warrant for the apprehension of any mandatory releasee shall be issued

only within the maximum term or terms for which the prisoner was sentenced, less one hundred eighty days.

§ 2.50 Same, youth offenders.

In addition to issuance of a warrant on the basis of violation of any of the condition of release, the responsible Regional Director may, when he is of the opinion that such youth offender would benefit by further treatment direct his return to custody or issue a warrant for his apprehension and return to custody. Upon his return to custody, such youth offender shall be given a revocation hearing under the same provisions as adult offenders as specified in § 2.54 to § 2.56. Following the revocation hearing parole may be reinstated, revoked or the terms and conditions thereof may be modified.

§ 2.51 Unexpired term of imprisonment.

The time a prisoner was on parole or mandatory release is not credited to the service of his sentence if revocation occurs. When a warrant is issued the sentence ceases to run, but begins to run again when the releasee is taken into Federal custody by the execution of the Board's violation warrant. However, the sentences of prisoners committed under the Narcotic Addict Rehabilitation Act or the Youth Corrections Act run uninterruptedly from the date of conviction

without regard to any revocation, except as provided in § 2.10(c). In no case may the commitment of a person under the Federal Juvenile Delinquency Act extend past his twenty-first birthday.

§ 2.52 Execution of warrant; notice of alleged violations.

(a) Any officer of any Federal correctional institution, or any Federal officer authorized to serve criminal process within the United States, to whom a warrant shall be delivered shall execute such warrant by taking such prisoner and returning him to the custody of the Attorney General. The warrant shall be considered delivered to a Federal officer when the warrant is signed and placed in the mail at the Board headquarters or regional office before the expiration of the maximum term of sentence.

(b) On arrest of the prisoner the officer executing the warrant shall deliver to him a copy of the Warrant Application listing the alleged violations of parole or mandatory release upon which the warrant was issued.

(c) If execution of the warrant is delayed pending disposition of local charges, for further investigation, or for some other purpose, the parolee or mandatory releasee is to be continued under supervision by the probation officer until the normal expiration of the sentence, or

until the warrant is executed, whichever comes first. Monthly supervision reports are to be submitted, and the releasee must continue to abide by all the conditions of release.

§ 2.53 Warrant placed as a detainer and dispositional interview.

(a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.

(b) Following the dispositional review the Regional Director may:

(1) Let the detainer stand

(2) Withdraw the detainer and close the case if the expiration date has passed;

(3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release.

(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

§ 2.54 Revocation by the Board, preliminary interview.

(a) A prisoner who is retaken on a warrant issued by a Board Member shall be given a preliminary interview by an official designated by the Regional Director to determine if there is probable cause to hold the prisoner for a revocation hearing and, if so, whether such revocation hearing should be conducted in the locality of the charged violation(s) or in a Federal institution. The official designated to conduct the preliminary interview may be a United States Proba-

tion Officer in the district where the prisoner is confined, provided he is not the officer who recommended that the warrant be issued.

(b) At the beginning of the preliminary interview, the hearing officer shall explain the Board's revocation procedure to the prisoner and shall advise the prisoner that he may have the preliminary interview postponed so that he may obtain representation by an attorney or may arrange for the attendance of witnesses. The prisoner shall also be advised that if he cannot afford to retain an attorney he may apply to a United States District Court for appointment of counsel to represent him at the preliminary interview and the revocation hearing. The prisoner may also request the presence of persons who have given information upon which revocation may be based. Such adverse witnesses shall be requested to attend the preliminary interview unless the prisoner admits a violation or has been convicted of a new offense committed while on supervision or unless the hearing officer finds good cause for their non-attendance. At the preliminary interview the hearing officer shall review the violation charges with the prisoner, receive the statements of witnesses and documentary evidence on behalf of the prisoner, and allow cross-examination of those adverse witnesses in attendance.

(c) At the conclusion of the preliminary interview, the hearing officer shall prepare and submit to the Regional Director a summary of the interview, which shall include recommended findings of whether there is probable cause to hold the prisoner for a revocation hearing. Upon receipt of the summary of the preliminary interview, the Regional Director shall either order the prisoner reinstated to supervision, order that a revocation hearing be conducted in the locality of the charged violation(s), or direct that the prisoner be transferred to a Federal institution for a revocation hearing.

(d) The prisoner shall be retained in local custody pending completion of the preliminary interview, submission of the summary of the hearing officer, and notification by the Regional Director relative to further action.

(e) A postponed preliminary interview may be conducted as a local revocation hearing, by an examiner panel or other hearing officer designated by the Regional Director provided that the prisoner has been advised that the postponed preliminary interview will constitute his final revocation hearing.

§ 2.55 Local revocation hearing.

(a) If the prisoner requests a local revocation hearing prior to his return to

a Federal institution, he shall be given a revocation hearing reasonably near the place of an alleged violation if the following conditions are met:

(1) The local hearing would facilitate the production of witnesses or the retention of counsel;

(2) The prisoner has not been convicted of a crime committed while under supervision; and

(3) The prisoner denies that he has violated any condition of his release. Otherwise, he shall be given a revocation hearing after he is returned to a Federal institution. However, the Regional Director may, on his own motion, designate a case for a local revocation hearing.

(b) If there are two or more alleged violations, the hearing shall be conducted near the place of the violation chiefly relied upon as a basis for the issuance of the warrant, as determined by the Regional Director.

(c) Following the hearing the prisoner shall be retained in custody until final action is taken relative to revocation or reinstatement, or until other instructions are issued by the Regional Director.

§ 2.56 Revocation hearing procedure.

(a) A revocation hearing shall be conducted by a hearing examiner panel or, in a local revocation hearing only, by another official designated by the Regional Director. In the latter case, the

decision relative to revocation shall be made by an examiner panel on the basis of the hearing summary pursuant to the provisions of § 2.23. A revocation decision may be appealed under the provisions of § 2.25, § 2.26, or § 2.27 as applicable.

(b) The purpose of the revocation hearing shall be to determine whether the prisoner has violated the conditions of his release and, if so, whether his parole or mandatory release should be revoked or reinstated.

(c) The alleged violator may present voluntary witnesses and documentary evidence in his behalf. However, the presiding hearing officer or examiner panel may limit or exclude any irrelevant or repetitious statement or documentary evidence.

(d) If the alleged violator has not been convicted of a new criminal offense while under supervision and does not admit violation of any of the conditions of his release, the Board shall, on the request of the alleged violator or on its own motion, request the attendance of persons who have given statements upon which revocations may be based. Those adverse witnesses who are present shall be made available for questioning and cross-examination in the presence of the alleged violator unless the presiding hearing officer or examiner panel finds good cause for their non-attendance.

(e) All evidence upon which the finding of violation may be based shall be disclosed to the alleged violator at the revocation hearing. The hearing officer or examiner panel may disclose documentary evidence by reading or summarizing the appropriate document for the alleged violator.

§ 2.57 Disclosure of records.

(a) Prior to any parole hearing conducted in his case pursuant to §§ 2.13, or 2.14, or at any time during his incarceration, a prisoner is entitled to review reports in his institution file containing factual material bearing on his offense behavior, personal history, and institutional progress, as provided in Bureau of Prisons Policy Statement No. 2211.8, dated June 12, 1975, provided that disclosure of such reports would not (1) threaten the life or physical safety of any person; (2) interfere with law inforcement proceedings; (3) disclose investigative techniques of a law enforcement agency; or (4) constitute a cleary unwarranted invasion of personal privacy. The reports to be disclosed to the prisoner, subject to the above exceptions, include but are not limited to the following:

(i) Sentence Computation Records;

(ii) Classification material (including progress reports);

(iii) Incident (disciplinary) reports;

(iv) Medical reports;

(v) F.B.I. identification reports (rap sheets).

(b) All requests for disclosure of documents in the institution file shall be addressed to the Bureau of Prisons staff at least seven days prior to the time such documents are to be viewed. Copies of documents will be furnished under applicable Bureau of Prisons regulations.

(c) Sole authority to disclose a Presentence Investigation Report is retained by the prisoner's sentencing court. A request for disclosure of the Presentence Investigation Report must be addressed to the Court which originated the document.

(d) Copies of documents contained in Board of Parole Regional Office files shall be made available to prisoners, their authorized representatives, and other persons, upon written request in accordance with applicable law and Department of Justice Regulations at 28 C.F.R. Part 16, Subparts C and D. The Board reserves the right to invoke statutory exemptions to disclosure in appropriate cases.

§ 2.58 Special parole terms.

(a) The Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801 to 966, provides that, on conviction of certain offenses, mandatory "special parole terms" must be imposed by the court as part of the sentence. This term is an additional period of supervision which follows the completion of the regular sentence, including completion of the supervision

period of such regular sentence on parole or mandatory release.

(b) At the time of release under the regular sentence, whether under full term expiration or under a mandatory release certificate or a parole certificate, a separate Special Parole Term certificate will be issued to the prisoner by the Bureau of Prisons.

(c) Should a releasee be found to have violated conditions of release during supervision under his regular sentence, i.e., before commencement of the Special Parole Term, he will be returned as a violator of his basic supervision period under his regular sentence; the Special Parole Term will follow unaffected. Should a releasee violate conditions of release during the Special Parole Term, he will be subject to revocation with the complete Special Parole Term to serve (but none of the separate regular sentence), and subject to reparole or mandatory release under the Special Parole Term.

(d) If the prisoner is reparoled under the revoked Special Parole Term a certificate of parole to Special Parole Term is issued by the Board. If the inmate is mandatorily released under the revoked "special parole term" a certificate of mandatory release to Special Parole Term will be issued by the Bureau of Prisons.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-6438

EWELL SCOTT ..... PETITIONER

V.

KENTUCKY PAROLE BOARD, ET AL. ..... RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS ACTION IS NOW MOOT?

II. WHETHER A CONSTITUTIONALLY COGNIZABLE INTEREST IN LIBERTY IS AT STAKE IN KENTUCKY PAROLE CONSIDERATION PROCEEDINGS SUCH THAT THE PROTECTIONS AFFORDED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ATTACH THERETO?

III. ASSUMING THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS APPLICABLE TO PAROLE CONSIDERATION PROCEEDINGS IN KENTUCKY, WHAT FORM OF PROCESS IS DUE?

STATEMENT OF THE CASE

After having been denied parole release at the conclusion of individual hearings held before the respondents, the petitioner and Calvin Bell[1] initiated an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Kentucky. The action challenged the parole consideration and hearing procedures utilized by the respondents as being in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The complaint sought declaratory and injunctive relief, was tendered as a class action on behalf of all other persons similarly situated, and was accompanied by a motion to proceed *in forma pauperis*. However, the District Court, without benefit of responsive pleadings, overruled the motion to proceed *in forma pauperis* and dismissed the action, stating that "[t]he procedural dictates of the Due Process Clause are activated only upon the deprivation of a right or entitlement of constitutional magnitude. Although the loss of freedom resulting from revocation of parole merits due process applicability (citations omitted), the denial of parole wreaks no such 'grievous loss'." (Appendix, hereinafter App., 14). Plaintiffs' subsequent motion for leave to appeal *in forma pauperis* was denied by the District Court on the ground that it was not taken in good faith.

However, a similar motion presented to the United States Court of Appeals for the Sixth Circuit was granted

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1/ Bell was subsequently released from incarceration on May 29, 1974, and, according to the petitioner, is now deceased.

and the case was submitted to that Court upon the record, briefs and oral arguments of counsel. Thereafter, on January 15, 1975, the Court of Appeals affirmed the decision of the District Court, concluding that "the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution." (App., 21). A subsequent petition for rehearing and suggestion of the appropriateness of a rehearing *en banc* was denied by the Court of Appeals on April 2, 1975.

On December 15, 1975, this Court granted certiorari. Thereafter, respondents filed a suggestion of mootness predicated upon the ground that the petitioner had been released on parole as of November 26, 1975. In response thereto, petitioner filed motions before this Court for substitution of parties and for intervention. After the respondents filed a response to the aforementioned motions this Court deferred action thereon to the hearing of the case on the merits.

SUMMARY OF ARGUMENT

I. The threshold determination to be made by this Court is whether the case at bar is now moot as a consequence of the petitioner having been paroled. The respondents urge that petitioner's current status as a parolee has in fact rendered this case moot since the petitioner is no longer subject to the procedures which are questioned on the merits of this action and has no present interest which is affected thereby. Furthermore, this action does not remain alive upon the ground that it is alleged to be a class action. Although this cause was

initiated as a class action it was never certified. Nor has it ever been judicially determined whether the petitioner has complied with the many prerequisites mandated by Federal Rule of Civil Procedure 23, and any variance therewith could be fatal to a classa action allegation. Moreover, the very nature of the parole consideration proceedings at issue here are uniquely personal insofar as they affect individual prisoners, thus militating against the appropriateness of class action application. Furthermore, an action such as this would be more suitable to a habeas corpus proceeding since if the procedures now utilized by respondents are unconstitutional, a question of possible illegal incarceration arises. *Preiser* v. *Rodriguez*, 411 U.S. 475 (1975).

Finally, petitioner's motion for substitution or alternatively for intervention is not well taken. Although there are circumstances wherein such relief would be proper, the respondent questions the propriety of permitting substitution or intervention here where the case has not been certified as a class action; where the affidavits of those individuals seeking substitution reveal dissimilar factual situations; and, where the relief requested by such a motion is merely an attempt to keep alive a case which is otherwise moot and should be dismissed.

II. The Due Process Clause of the Fourteenth Amendment to the United States Constitution does not extend to parole consideration proceedings utilized by the respondents in determining whether petitioner should be released on parole. The nature of the interest at stake

in such a proceeding is not one which would fall within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). Although petitioner maintains that a substantial interest in liberty is implicated, petitioner had no interest in liberty at the time these proceedings affected him because he had previously been constitutionally deprived of liberty by mandate of law. Petitioner's mere hope or anticipation of possibly being extended a parole at these proceedings did not rise to a constitutionally cognizable interest which would require procedural due process protection. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Unlike the situation in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the Commonwealth of Kentucky had not extended to the petitioner a state created right which it then revoked. Under Kentucky statutes and regulations the petitioner was given the right to be considered for parole after having served a certain portion of his sentence. KRS 439.330, KRS 439.340, KRS 439.350; .501 Kentucky Administrative Regulation 1;010. Pursuant to the foregoing authority the respondents are given broad discretion in determining whether a parole should be granted. That determination can be made only after numerous factors involving many disciplines and factors are considered. Even then, "[A] parole shall be ordered only for the best interest of society . . . and when the board [respondents] believes he [a prisoner] is able and willing to fulfill the obligations of a law abiding citizen." KRS 439.340. Under these circumstances the

petitioner acquired no interest in liberty which would require the extension of procedural due process protections to parole consideration proceedings in Kentucky.

III. Because the actual facts of this case as opposed to those pleaded by the petitioner have never been developed, if this Court holds that the Due Process Clause of the Fourteenth Amendment applies to Kentucky parole consideration proceedings, respondents respectfully submit that the case should be remanded for development of an evidentiary basis for determining what process is due. If the Court elects to proceed to the question of what process is due based upon the present record, repondents contend that the nature of Kentucky parole consideration proceedings militates against imposition of the adversary procedures which petitioner claims are constitutionally required. Each of the specific rights which petitioner claims as his due fly in the face of the non-adversary nature of those proceedings and would create overwhelming administrative difficulties without according substantial benefits to individual prisoners. Petitioner's requests for notice of information contained in his file, compulsory process for production of evidence, counsel at parole consideration interviews and a written statement of reasons for parole deferments contemplate a court created parole consideration procedure far different from that created by the Kentucky General Assembly. If the Kentucky legislature cannot in conformity with the Due Process Clause create the kind of parole system which the respondents administer, then it is the organic law of that system, not the procedures utilized by the respondents, which is constitution-

ally infirm. If the legislature has not acted invalidly, then the relief requested by the petitioner must be deemed merely a request for a change in legislative policy to be implemented by that body, not by this Court.

ARGUMENT

I

THIS CAUSE IS NOW MOOT SINCE THE PETITIONER HAS BEEN GRANTED PAROLE.

After this Court granted *certiorari* on December 15, 1975, the respondents filed a suggestion of mootness predicated upon the ground that the petitioner had been released on parole as of November 26, 1975. Thereafter, petitioner filed a response to the suggestion of mootness as well as a motion for leave to substitute named petitioners or, in the alternative, to intervene. This Court has deferred consideration of those matters to the hearing of the case on the merits. Respondents respectfully submit that the cause has been rendered moot due to the petitioner's release on parole.

In his response to the suggestion of mootness the petitioner maintained that although he was released on parole, this case remains alive because he is subject to parole supervision and the possibility remains that his parole may be revoked. Thus, he concludes that this controversy, insofar as it concerns him, is capable of repetition but evades review. But, if anything, the presumption should be entertained that the petitioner will not have his parole revoked. However, the respondents submit that the mere possibility that petitioner's parole may at some future date be revoked is purely speculative and completely insufficient to avoid the applicability

of the doctrine of mootness in the case at bar. In order to avoid the effect of mootness, the petitioner must show that in all *probability* he will again be subject to the parole consideration procedures as utilized by the respondents. *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498 (1911). Respondents contend that the petitioner has failed to demonstrate such a probability exists.

Weinstein v. *Bradford,* 44 U.S.L.W. 3372 (U.S. Dec. 10, 1975), a case similar to the one at bar, was vacated as moot by this Court where the prisoner had received a parole. Of course, respondents recognize that in *Weinstein* v. *Bradford,* supra, the prisoner's parole ripened into complete release and the Court therefore concluded that the prisoner no longer had any present interest affected by the policy of the parole board in that case. However, the respondents submit that the petitioner, by virtue of his parole, no longer has any present interest affected by the parole consideration procedures which are the subject of attack in this litigation even though that parole does not constitute complete release. *Weinstein* v. *Bradford,* supra.

Alternatively, petitioner relies upon *Sosna* v. *Iowa,* 419 U.S. 393 (1975) and *Gerstein* v. *Pugh,* 420 U.S. 103 (1975) in urging that the instant case is a class action and as such the cause still survives through the members of the class even though petitioner has been released on parole and may no longer be a proper party to this action. However, the respondents urge that the aforementioned authorities are not applicable to the case at bar. Significantly, both *Gerstein* v. *Pugh,* supra, and *Sosna* v. *Iowa,* supra, were certified as class action suits,

as a consequence of which the members of the class were imbued with a legal status which survived the removal of the named parties from those cases. The instant case, although initiated pursuant to 42 U.S.C. § 1983 and containing class action allegations, was never certified as a class action under Federal Rule of Civil Procedure 23. A suit does not become a class action merely because it has been demanded in the complaint. *Albertson's, Inc.* v. *Amalgamated Sugar Co.,* 62 FRD 43, (D.C.Utah, 1973), affirmed in part, reversed in part 503 F.2d 459 (10th Cir. 1974).

As noted in *Weinstein* v. *Bradford,* in the absence of a class action it is the teaching of *Sosna* v. *Iowa,* supra, that the "capable of repetition yet evading review" doctrine is limited to the situation where (1) the challenged action was of too short a duration to be fully litigated prior to its cessation or expiration *and* (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. As in *Weinstein* v. *Bradford,* the case at bar is not a class action and respondents have established that petitioner fails to meet the latter of the two elements set out above. Therefore, respondents respectfully submit that the case is moot.

Furthermore, it should be noted that the respondents maintained before the Circuit Court of Appeals that *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), should be construed as requiring petitioner's complaint to be treated as a petition for writ of habeas corpus under 28 U.S.C. § 2254, rather than as a civil rights action under 42 U.S.C. § 1983. Cf. *Baskins* v. *Moore,* 362 F.Supp. 187

(D.S.C. 1973). This contention was predicated upon the ground that parole release consideration is of an uniquely personal nature and, if petitioner's contentions on the merits proved true, it is conceivable that his incarceration might not have been legal. Thus, the case would more appropriately be one of habeas corpus application than of civil rights. This is significant because habeas corpus proceedings cannot usually be maintained as class actions.

Insofar as petitioner's motion for leave to substitute named parties is concerned, respondents submit that it is without legal foundation in light of the fact that this case is not a class action. Furthermore, petitioner's alternative motion for intervention, predicated upon *Mullaney* v. *Anderson,* 342 U.S. 415 (1952), is also without merit. The extenuating circumstances in *Mullaney* are not found here. The motion for intervention in the case at bar is merely an attempt to keep alive a cause which is now moot and therefore the motion, which may not be timely, should not be granted.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT APPLY TO KENUCKY PAROLE CONSIDERATION PROCEEDINGS BECAUSE NO CONSTITUTIONALLY COGNIZABLE INTEREST IN LIBERTY IS AT STAKE.

Prior to 1972 courts throughout this country unanimously and consistently rejected the contention that the Due Process Clause applies to parole consideration

proceedings. 'Generally speaking, matters pertaining to parole consideration, revocation, and the right to good time credits were not deemed to be within the proper purview of the courts since they were considered matters of "grace" and of privilege — not of right.

However, on June 29, 1972, this Court handed down its Opinions in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564 (1972), and *Perry* v. *Sindermann,* 408 U.S. 593 (1972). Although only the first of these dealt with a prison situation, all three cases are significant in that, when considered together, they definitively establish the manner in which interests, alleged to be protected by the Due Process Clause of the Fourteenth Amendment, are to be analyzed in order to reach a determination of whether those protections in fact attach. In *Morrissey* v. *Brewer* this Court rejected application of the "right - privilege doctrine"[2] and held that the Due Process Clause was applicable to parole revocation hearings and that certain minimum requirements of due process must be

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1/ Menechino v. Oswald, 430 F.2d 403 (2nd Cir. 1970), cert. denied 400 U.S. 1023 (1971); **Dorado v. Kerr,** 454 F. 2d 892 (9th Cir. (1972); **Tarlton v. Clark,** 441 F. 2d 384 (5th Cir. 1971), cert. denied 403 U.S. 934 (1971); **Ott v. Ciccone,** 326 F.Supp. 609 (W. D. Mo. 1970); **Madden v. New Jersey State Board of Parole,** 438 F.2d 1189 (3rd Cir. 1971); **United States ex rel Bey v. Connecticut Board of Parole,** 443 F. 2d 1079 (2nd Cir. 1971), vacated as moot 404 U.S. 879 (1971).

2/ Graham v. Richardson, 403 U.S. 365, 374 (1971).

met before a parole can be revoked. On the other hand, in *Board of Regents* v. *Roth* the Court concluded that the Due Process Clause did not require an opportunity for a hearing prior to the non-renewal of a non-tenured state teacher's one-year contract absent a showing that the non-renewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment. In *Sindermann,* the companion case to *Roth,* this Court concluded that the nature of the individual's interest, predicated upon an alleged *de facto* tenure policy of a school, may have been of such substance as to be a protected interest within the Due Process Clause and therefore affirmed the circuit court's remand of that case for further consideration.

The analysis given by this Court to the issue of the applicability or non-applicability of the Due Process Clause was similar in *Morrissey, Roth* and, to a lesser extent, in *Sindermann,* although the Court reached different conclusions in each case due to the particular circumstances involved. Nearly two years later this Court rendered its Opinion in *Wolff* v. *McDonnell,* 418 U.S. 539 (1974), holding that once a state created the right to good time credit and recognized the deprivation of such as a sanction authorized for major misconduct, the prisoner's interest had real substance and was sufficiently embraced by the Due Process Clause of the Fourteenth Amendment as to entitle him to certain minimum procedures to insure that the state created right would not be arbitrarily abrogated. Again, this Court reached its conclusion as to the alleged applicability of the Due

Process Clause upon the basis of the principles enunciated in *Morrissey* and *Roth.*

In the wake of *Morrissey* v. *Brewer,* supra, lower courts have reconsidered the question of whether due process applies to parole consideration and release procedures. Since 1972 there has been a clear and distinctive split among various jurisdictions as to the determination of this issue in light of *Morrissey* v. *Brewer* and more recently, *Wolff v. McDonnell.* Whereas some have rejected the view that due process applies to parole consideration and release procedures, others have held to the contrary.[3] The significance and effect to be given those lower court decisions is questionable since in neither *Morrissey* nor any of its progeny has this Court

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3/ Compare **Scarpa v. United States Board of Parole.** 477 F.2d 278 (5th Cir. 1973), en banc, vacated and remanded for consideration of mootness 414 U.S. 809 (1974); **Farries v. United States Board of Parole,** 484 F. 2d 948 (7th Cir. 1973); **Mosley v. Ashby,** 459 F.2d 477 (3rd Cir. 1972); **Battle v. Norton,** 365 F.Supp. 925 (D.Conn. 1973); **Barradale v. United States Board of Paroles and Pardons,** 362 F.Supp. 338 (M.D. Pa. 1973); **Bradford v. Weinstein,** 357 F.Supp. 1127 (E.D.N.C. 1973), reversed 519 F.2d 728 (4th Cir. 1974), vacated as moot 44 U.S.L.W. 3372 (U.S. Dec. 10, 1975); **United States ex rel Johnson v. Chairman of New York State Board of Parole,** 500 F.2d 925 (2nd Cir. 1974), vacated as moot sub. nom. **Regan v. Johnson,** 419 U.S. 1015 (1974); **Candarini v. Attorney General,** 369 F.Supp. 1132 (E.D.N.Y. 1974); **Childs v. United States Board of Parole,** 371 F.Supp. 1246 (D.D.C. 1973), affirmed 511 F.2d 1270 (D.C.Cir. 1974); **Johnson v. Heggie,** 362 F.Supp. 851 (D.Colo. 1973); **United States ex rel Harrison v. Pace,** 357 F. Supp. 354 (E.D.Pa. 1973); **In Re Sturm,** 11 Cal. 3rd 258, 521 P.2d 97 (1974).

dealt directly with the issue of parole *release* procedures. Moreover, the significance of such cases as *Board of Regents* v. *Roth* and *Perry* v. *Sindermann* has been either misconstrued[4] or ignored by the lower courts when dealing with constitutional due process issues pertaining to a prisoner's parole release hearings. The respondents respectfully submit that the application of the analytical principles enunciated in *Morrissey* v. *Brewer, Wolff* v. *McDonnell, Board of Regents* v. *Roth,* and to a lesser extent in *Perry* v. *Sindermann* to the case now before this Court will require the conclusion that the Due Process Clause of the Fourteenth Amendment does not attach to parole release hearings because the "nature of the interest" therein considered does not rise to constitutional magnitude. The petitioner on the other hand, relying on *Morrissey* v. *Brewer* and *Wolff* v. *McDonnell,* urges the opposite conclusion. The respondents will now direct this Court's attention to the consideration of what they consider the primary issue in this case: Whether due process attaches?

Generally speaking, the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of "liberty" and "property" and when such pro-

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4/ For example, see **Bradford v. Weinstein, 519 F.2d 728,** at 731 (4th Cir. 1974), vacated as moot 44 U.S.L.W. 3372 (U.S. Dec. 10, 1975), and **United States ex rel Johnson v. Chairman, New York State Board of Parole,** 500 F.2d 925, at 927 (2d Cir.), vacated as moot sub nom. **Regan v. Johnson, 419 U.S. 1015 (1974).**

tected interests are in fact implicated, the right to some kind of prior hearing is paramount. *Board of Regents* v. *Roth,* at 569. However, the range and scope of interests which can be protected by procedural due process is not infinite. After all, the procedural requirements of the Due Process Clause do not attach to "every conceivable case of government impairment of private interest." *Cafeteria and Restaurant Workers v. McElroy,* 367 U.S. 886, 894 (1961).

It has now become axiomatic that in order to make a determination as to whether due process requirements apply in the first place, the Court must look not to the weight or degree of a particular individual's interest, but to the "nature of the interest" at stake to see if it falls within the Fourteenth Amendment's protection of "liberty" or "property" and thus is one entitled to constitutional protection. *Roth,* at 572. *Morrissey* v. *Brewer,* 408 U.S. at 481; *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). If, upon analysis, it is determined that the nature of the interest is within the "liberty" or "property" context of the Fourteenth Amendment, the procedural due process protections mandated by that Amendment will attach depending upon the extent to which the individual will be "condemned to suffer grievous loss." *Morrissey* v. *Brewer,* supra, at 481; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 168 (1951); *Goldberg* v. *Kelly,* 397 U.S. 254, 263 (1970).

Here, the petitioner vigorously maintains that he had an interest in "liberty" of such substance as to be protected by the Due Process Clause of the Fourteenth Amendment. In support of this contention he relies upon

his *personal interest* in being granted parole and the fact that many such paroles are granted other prisoners. In short, he equates the "conditional liberty" of a parolee, as in *Morrissey*, and a statutorily created right to accrued good time credits, as in *Wolff*, to his own circumstances. Thus, he concludes that he suffered a "grievous loss" when the parole board deprived him of an alleged entitlement to conditional liberty by refusing to grant him a parole without according him procedural due process. The respondents disagree.

Obviously, the petitioner's personal interest in the possibility of his being paroled was of major concern to him. However, this particular circumstance is analogous to that in *Roth* where this Court recognized that the individual's personal interests in that case were of major concern to him — concern that surely was not insignificant. *Roth*, at 571. However, such a consideration as the individual's personal interest is only a part of the weighing process used to reach a determination of the *form* of hearing required in particular situations by procedural due process *after it has been determined that procedural due process protections attach.* And, as previously noted, the *initial determination* that must be made is whether due process requirements attach at all, and in doing so this Court will look not to the degree of concern an individual may have in a particular interest but to the "nature" of the interest at stake.

Here, the simple fact of the matter is that by

virtue of his felony conviction[5] the petitioner had been constitutionally deprived of any interest in his own liberty by mandate of law until such time as he had served the sentence meted out to him, minus good time credits. Cf. *Harrison* v. *Robuck*, Ky., 508 S.W. 2d 767 (1974). Under Kentucky law the petitioner was not entitled to any kind of liberty, conditional or otherwise. All that he was entitled to was a parole consideration hearing after he served the minimum period of time for parole eligibility. He was granted that hearing. Although the hearing might *possibly* have resulted in the petitioner being granted "conditional" liberty, such liberty was neither assured nor guaranteed. At the hearing conditional release was in fact denied and petitioner's case was deferred for two years. Hence, all that the petitioner lost for that period of time was the possibility of conditional liberty, which can best be characterized as nothing more than a "mere hope or anticipation" on the part of the petitioner and did not reflect an "interest" of such a nature as would be embraced by the Due Process Clause.

In *Morrissey* v. *Brewer*, this Court quoted approvingly from *United States ex rel Bey* v. *Connecticut State Board of Parole*, 43 F. 2d 1079, 1086 (2d Cir. 1971), vacated as moot, 404 U.S. 879, a case sharply distinguish-

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5/ Petitioner was convicted in the Kenton County, Kentucky Circuit Court of robbery, for which he received a ten year sentence, and armed robbery, for which he received a twelve year sentence. Both sentences were to be served concurrently.

ing between parole revocation and intitial parole decision making. That footnote reads as follows:

> "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." 408 U.S. at 482, note 8.

The foregoing clearly indicates that this Court recognizes a substantial difference in the importance of maintaining one's conditional liberty as opposed to the "mere anticipation or hope of freedom." It is equally evident that this Court did not equate conditonal lberty with the hope of parole release. See also *Bradford* v. *Weinstein*, 357 F.Supp. 1127 (E.D.N.C. 1973), reversed 519 F.2d 728 (4th Cir. 1974), vacated as moot 44 U.S.L.W. 3372 (U.S. Dec. 10, 1975). The manner in which a parole board exercises its discretion in granting or denying a parole to an incarcerated felon is clearly distinguishable from revoking a prisoner's conditional freedom once he is paroled.

As the District Court in *Barradale* v. *United States Board of Paroles & Pardons*, 362 F.Supp. 338 (M.D.Pa. 1973), pointed out:

> ". . . the interest which plaintiff has in being released on parole is not one which he is presently enjoying. Unlike a parole revocation hearing where one's continued liberty is at stake, . . . a prisoner applying for parole has no right to be released until he has served his full term less his good time credits. Whether he will be released on parole prior to the

> expiration of his sentence is wholly within the discretion of the Board." *Id* at 341.

In that case, as in the present one, there was no threat to an "existing private interest." *Ibid.*

Petitioner also offers *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), in support of his allegation that his interest in parole release should be sufficient to require the application of the Fourteenth Amendment. However, in ruling that prison disciplinary proceedings are subject to basic procedural requirements due to the possibility of revocation of good time credit, this Court relied heavily upon the Nebraska Revised Statutes, § 83-1, 107 (Supp. 1972), providing for the allowance and reduction of good time. The Court stated:

> ". . . the State itself has not only provided a *statutory right* to good time credit but also specifies that it is to be forfeited only for serious misbehavior . . . the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's *interest has real substance* and is sufficiently embraced within the Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* at 557. (Emphasis added).

Thus *Wolff* is merely another instance in which this Court has required due process protections because the nature of the interest involved, i.e. days of liberty in

the form of good time credit guaranteed to him by a state statute, rises to constitutional magnitude. It is inapposite where, as here, no statutorily created right is extended and then withdrawn.

The Commonwealth of Kentucky does not grant the inmate a right to parole, but grants the Parole Board the *discretion* to release an inmate on parole. KRS 439.340 and 439.330. KRS 439.340 provides:

> "(1) The board may release on parole such persons confined in any adult state penal or correctional institution of Kentucky as are eligible for parole. All paroles shall issue upon order of the board duly adopted. As soon as practicable after his admission and at such intervals thereafter as it may determine, the Division of Institutions shall obtain all pertinent information regarding each prisoner, except those not eligible for parole. Such information shall include his criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made. The Division of Probation and Parole shall furnish the circumstances of his offense and his previous social history to the institution and the board. The Division of Institutions shall prepare a report on such information as it obtains. It shall be the duty of the Division of Probation and Parole to supplement this report with such material as the board may request and submit such report to the board.
>
> "(2) Before granting the parole of any prisoner, the board shall consider the pertinent information regarding the prisoner and shall have him appear before it, or one or more members for interview and hearing. A parole shall be ordered only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes he is able and willing to fulfill the obligations of a law abiding citizen.
>
> "(3) The Board shall adopt such rules or regulations as it may deem proper or necessary with respect to the eligibility of prisoners for parole, the conduct of parole hearings, or conditions to be imposed upon parolees. Regulations governing the eligibility of prisoners for parole shall be in accordance with prevailing ideas of correction and reform."

It is clear that before the respondents can grant a parole under KRS 439.340(2), the Board must in its discretion determine that the inmate being considered is "able and willing to fulfill the obligations of a law abiding citizen." All that an inmate has at any time before this determination is made is a mere anticipation or hope of parole release. Such an anticipation is not an interest of "real substance" within the meaning of the Fourteenth Amendment. For example, the Fifth Circuit Court of Appeals in a post-*Morrissey* decision held that an interest in parole release is not a right protected by the Fourteenth Amendment:

"The emerging and underlying principle is clear; once a cognizable benefit is conferred or received, governmental action must not be employed to deprive or infringe upon that right without some form of prior hearing. We are unaware, however, of any authority for the proposition that the full panoply of due process protections attaches every time the government takes some action which confers a new status on the individual or denies a request for a different status.

". . . [Petitioner] Scarpa is a convicted felon currently incarcerated in prison for his past transgressions. This manifest deprivation of liberty is the result of a due process hearing. The sentencing judge mandated a possible confinement of eight years. Scarpa now attempts to equate the possibility of conditional freedom with the right to conditional freedom. We find such logic unacceptable.

"If the Board refused to grant parole, Scarpa has suffered no deprivations. He continues the sentence originally imposed by the court . . . ." *Scarpa* v. *U.S. Board of Parole,* 477 F. 2d 278 at 282, vacated and remanded for consideration of mootness, 414 U.S. 809 (1973); Also see *Wiley* v. *Board of Parole,* 380 F. Supp. 1194 (M.D. Pa. 1974).

The reasoning set out above in *Scarpa* is equally applicable to the case at bar because, as previously noted, the petitioner had been constitutionally deprived of any right to liberty for the duration of his sentence. Peti-

tioner suffers no deprivation by being denied parole, he merely continues in the same status as before. Clearly, the nature of the interest in issue here is not one embraced by the Due Process Clause of the Fourteenth Amendment.

Furthermore, it is of inescapable significance that in each and every instance the protections attendant to the Due Process Clause have only been extended where an individual is *presently enjoying* or is *presently entitled* to an interest which has been extended to him. For example, in *Morrissey* v. *Brewer,* the individual was enjoying conditional liberty as a consequence of having been extended a parole. This Court concluded that the individual's interest in the conditional liberty was of such substance as to result in a "grievous loss" if it were revoked without a due process hearing. Similarly, in *Wolff* v. *McDonnell,* a prisoner had accrued good time credits which were guaranteed to him by state statute. In *Wolff* this Court held that once those good time credits accrued to the prisoner, they could not subsequently be taken away without the benefit of a due process hearing. Here, on the other hand, the respondents have established that the nature of the interest is not of such magnitude as to invoke the protection of the Due Process Clause. It would be incongruous to conclude that the Due Process Clause applies here where the petitioner is entitled to no liberty whatsoever[6] and thus can suffer no loss of liberty as a

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6/ The petitioner has predicted his case upon the "liberty" aspect of due process as opposed to that of "property." In any event, this Court has recognized that the analysis of both concepts are parallel. **Wolff v. McDonnell,** at 567.

consequence of the actions taken by the respondents. This being so, no grievous loss occurs. Therefore, it is respectfully submitted that the petitioner had no constitutionally cognizable interest in liberty at stake. Accordingly, the protections afforded by the Due Process Clause of the Fourteenth Amendment do not attach to parole consideration procedures in Kentucky.

III.

ALTHOUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT MAY APPPLY TO KENTUCKY PAROLE CONSIDERATION PROCEEDINGS, RESPONDENTS ASSERT —AND REQUEST THE OPPORTUNITY TO PROVE—THAT THEIR PRESENT METHODS OF CONSIDERATION AFFORD ALL NECESSARY CONSTITUTIONAL PROTECTIONS.

A. IF THE SUMMARY DISMISSAL OF PETITIONER'S COMPLAINT WAS ERRONEOUS, THIS CASE SHOULD BE REMANDED FOR THE PURPOSE OF DEVELOPING EVIDENCE OF THE ACTUAL METHODS OF CONSIDERATION UTILIZED BY THE RESPONDENTS.

Because the lower courts have deemed the petitioner's complaint subject to summary dismissal, the respondents have never had the opportunity to refute the factual allegations set out in that complaint. Given this state of the record, respondents respectfully submit that it would be singularly inappropriate for this Court to reach the question of whether the actual facts, as opposed to those pleaded, demonstrate that the respondents' present methods of practice in parole consideration proceedings are constitutionally infirm. Respondents accordingly urge that should this Court determine that the Due Process Clause of the Fourteenth Amendment in fact governs those proceedings, it should forego delving into the delicate balancing process required for ascertaining exactly what minimal constitutional safeguards are applicable to them. Indeed, petitioner has recognized the difficulties which would be encountered in attempting to formulate meaningful procedural guidelines in the context of the present record, and he too has recognized that the more appropriate course may be to remand this case for an evidentiary hearing without now specifying what process is due. (Brief for Petitioner, 41-44).

B. THE VERY NATURE OF PAROLE CONSIDERATION PROCEEDINGS MILITATES AGAINST IMPOSITION OF THE ADVERARY PROCEDURES WHICH PETITIONER CLAIMS ARE CONSTITUTIONALLY REQUIRED.

Should this Court consider remand unnecessary, the respondents submit that the kind of adversary procedures which petitioner seeks to have implemented in parole consideration proceedings would unduly impair both the interests of the respondents and the interests of the prisoners with whom they deal. The due process standard is, after all, flexible and it mandates only such procedural safeguards as the particular situation demands. "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Cafeteria and Restaurant Workers Union v. *McElroy*, 367 U.S. 886, 895 (1961).

The Kentucky Parole Board was created for the specific purpose of ordering paroles "for the best interest of society" upon determining that convicted felons incarcerated in Kentucky penal institutions have been sufficiently rehabilitated to be ". . . able and willing to fulfill the obligations of . . . law abiding citizen(s)." KRS 439.340(2). In order for the respondents to properly execute their legislatively mandated task, they must draw upon all available information which may enable them to reasonably predict whether a given prisoner is ready to undertake the responsibilities and accompanying strains which will be encountered if he is allowed to return to the free community. The respondents' concern is for the individual prisoners as well as for the society at large, and it is imperative that this duality of concern be kept in mind in prescribing the procedural safeguards which the respondents must afford to the prisoners they consider in order that it may be assured that the forms of practice imposed do not frustrate them in their attempt to make the best decision for the state and for the individuals.

The respondents' position is substantially identical to that described by Judge (now Chief Justice) Burger in *Hyser* v. *Reed*, 115 U.S.App.D.C. 254, 318 F.2d 225, cert. denied sub nom. *Thompson* v. *United States Board of Parole*, 375 U.S. 957 (1963):

> "The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed

> in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege. 'Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders.' *Williams* v. *People of State of New York*, 337 U.S. 241. at 249, 69 S. Ct. 1079, at 1084, 93 L. Ed. 1337.
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> * * * * * *
>
> "Fundamentally the Parole Board's interest and its objective are to release a prisoner as soon as he is a good parole risk and to allow him to remain at liberty under supervision as long as he is a good risk." (318 F. 2d at 237, 242).

Certainly the situation in this case is far different from that presented in the context of parole revocation hearings and, as this Court has stated, even those hear-

ings are ". . . not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation." *Morrissey* v. *Brewer*, 408 U.S. at 480. It is, in fact, the respondents' position that the distinction between parole consideration proceedings and parole revocation proceedings is so substantial that a far greater reduction of the "full panoply of rights" than Morrissey allowed for revocation hearings should be tolerated in initial consideration proceedings. Respondents believe that in view of this distinction, the methods of consideration which they presently employ would upon remand be determined to sufficiently satisfy the requirements of the Due Process Clause. Further, even if some deficiencies were found in the respondents' current practice, the present methods of consideration are clearly far more appropriate to the non-accusatory parole consideration process than is the kind of adversary procedural format for which the petitioner contends.

Petitioner insists on four connected procedural rights which he believes are constitutionally required in parole consideration proceedings. He first asserts that the respondents must given him notice of and the right to dicover all factual information which might cause them to find it inappropriate to order immediate parole. Second, he contends that he ought to be granted a more lengthy and thorough-going interview with respondents than is permitted under present practice in order that he may argue away or rebut the "adverse" information in his file. Third, he professes a need for the representation of an advocate who can effectively argue for his

expeditious release before the respondents. Finally, he demands that if the respondents fail to conclude that parole is presently appropriate, they enter written findings explaining the reasons for not so concluding and outlining the conditions or requirements which the disappointed prisoner should fulfill in order to achieve parole release when next appearing for consideraton.

Analyzing petitioner's demands in the order in which they are made, respondents first submit that it would constitute a pernicious and counterproductive policy for inmates to have discovery of all "adverse" information contained in their files. The statutorily mandated content of every prisoner's file consists of his criminal record, social history, institutional record and reports and evaluations which case workers and other correctional personnel are required to assemble. KRS 439.340(1). Since the inmate knows his own criminal record and is aware of any formal disciplinary actions which have resulted from his institutional misconduct, realistically speaking the only "adverse" information which he could discover by being allowed to review his file would be unfavorable parole suitability evaluations compiled by correctional officers. The harm inherent in allowing an inmate access to this particular type of information is obvious. Beyond the fact that the reports may appear to the inmate to be more unfavorable than they actually are, it will be impossible as a practical matter to obtain honest and straightforward reports upon an inmate's institutional adjustment and suitability for parole if the staff personnel charged with making those reports are aware of the fact that an inmate whom

they evaluate unfavorably will have free access to the contents thereof.

Secondly, petitioner's request for a more extensive personal interview with respondents would not only entail an overwhelming administrative burden, but would also fly in the face of the essential nature of parole consideration proceedings. The inmate already has the opportunity to freely assert any information favorable to his case for release that he has in his own possession. Since there are no accusers in these proceedings and the inmate is not being "charged" with specific or general misconduct, it is difficult to discern the necesssity or utility of extending to the inmate the right to cross-examine those correctional personnel whose reports are made part of his file. It cannot be stressed too often that parole consideration proceedings are not adversary in nature and that there are therefore no accusers whom the inmate ought to have the right to confront. Further, there is little general or specific information of relevance which the inmate could produce should he be extended compulsory process for obtaining witnesses in his own behalf because respondents perform a predictive, not a fact-finding function.

Third, petitioner's contention that he ought to be allowed the representation of an advocate once again demonstrates that he misconstrues the nature of parole consideration procedures. Petitioner intimates that parole interviews are complex, procedure-laden, adversary proceedings wherein specific disputed facts are to be proven or disproven. A right to counsel is therefore asserted. But an absolute right to counsel was not even found in

the context of parole revocation hearings, *Morrissey*, supra, and certainly there is much less constitutional basis for arguing that an inmate ought to be represented by counsel at an interview at which the respondents are not exploring alleged misconduct, but are attempting to determine whether the prisoner is suitable for conditional release. The respondents do not determine cases based upon narrow inquiry into specific facts, but rather make broad based predictions of future conduct based upon generalized behavioral data and attitudinal perceptions. An attorney or lay advocate would be hard pressed to refute such generalized information. Hence, it is not probable that representation by an advocate would improve an inmate's chance for parole. On the other hand, it is quite probable that permitting inmates to appear with advocates would over-complicate the proceedings had before the respondent Board and bring an end to its efficient and expeditious operation. The facts, therefore, militate against a right to counsel in parole consideration proceedings. *Menechino* v. *Oswald*, 430 F.2d 402 (2d Cir. 1970), cert. denied 400 U.S. 1023 (1971).

If petitioner is entitled to any court ordered alteration in Kentucky parole consideration proceedings, then he may be entitled to his last demanded right to have a written statement of reasons for parole deferment. *United States ex rel Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925 (2d Cir.), vacated as moot sub nom. *Regan* v. *Johnson*, 419 U.S. 1015 (1974). Petitioner's ability to make this demand is, however, subject to question because he admits that the

respondents gave him an explanation for their action. Respondents told the petitioner that he was being deferred because they believed he needed to "have more time to get together." (App. 6). The respondents thus informally told petitioner that his record did not indicate he was yet ". . . able and willing to fulfill the obligations of a law abiding citizen." KRS 439.340(2). Since the respondents' statement of reasons is expressed in terms relating to the discretion vested in them by statute, petitioner's demand for further explanation must be understood as an assertion that the statement is inadequate as a matter of law under the Due Process Clause. The respondents, however, acted within the discretion granted to them by the Kentucky General Assembly. If their actions offended the Due Process Clause, the offense must result from the fact that the General Assembly has delegated so much discretion to them that they are empowered by the statute to arbitrarily exercise legislative prerogatives. If this conclusion is to be accepted, then the organic law of the Kentucky parole system is unconstitutional because it attempts to grant the respondents legislative discretion. Accordingly, far from being entitled to have a more definitive statement of reasons why he was not released on parole in 1973, petitioner is not entitled to the conditional freedom he presently enjoys. He was released under a statute which is void because unconstitutional under the Due Process Clause. Thus, the only "relief" to which the petitioner is entitled is to be returned to prison.

Petitioner is not, of course, seeking to have the

entire Kentucky parole system branded as null and void under the United States Constitution. What he really wants is a court ordered revision of KRS Chapter 439 requiring the respondents to set up hearing procedures not envisioned at the time that chapter was originally enacted. Perhaps as a matter of policy it would be preferrable if new procedures were implemented resulting in the petitioner being granted his request for a full blown written rationale in cases where parole release is deferred. Perhaps the petitioner is also right when he says it would be better if in such cases the respondents set out exact pre-conditions which when fulfilled would insure parole release in the future. But, the Kentucky parole system was set up as it now operates by the Kentucky General Assembly and petitioners requests for changes in that system for policy reasons should be addressed to that body, not to this Court. *Harrison* v. *Robuck*, Ky., 508 S.W 2d 767 (1974). Unless the petitioner is willing to have this Court invalidate the entire Kentucky parole system, all of his demands for specific procedural protections not presently being accorded in parole consideration proceedings must be viewed merely as requests for changes in policy and not as attempts to enforce rights created by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Respondents submit that this case has been mooted by virtue of petitioner's parole release. However, if this Court disagrees with that conclusion respondents

steadfastly contend that petitioner had no liberty at stake when he was initially considered for parole and, hence, that parole consideration proceedings are not governed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Accordingly, respondents submit that the Opinion of the United States Court of Appeals for the Sixth Circuit should be affirmed. Should this view not prevail, respondents request that the case be remanded so that they may have the opportunity to prove that their present procedures provide all protection which prisoners being considered for parole are due. In any event, respondents urge that the specific protections requested by the petitioner are inapposite in the non-adversary context of parole consideration proceedings.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 74-6438

EWELL SCOTT, etc.,

v.

KENTUCKY PAROLE BOARD, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I.

THE ELEMENTARY LIBERTY INTEREST IMPLICATED IN THE DECISION TO GRANT OR DENY PAROLE QUALIFIES FOR PROTECTION UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. UNDER THE PRACTICES OF THE EXISTING SYSTEM, PRISONERS HAVE A LEGITIMATE EXPECTATION OF RELEASE ON PAROLE SUFFICIENT TO TRIGGER THE PROCEDURAL PROTECTIONS OF THE DUE PROCESS CLAUSE.

In the face of the "'magestic'" concept of liberty, Board of Regents v. Roth, 408 U.S. 564, 571 (1972), the state and the Solicitor General argue, on the following grounds, that parole release decisionmaking is immune from the requirements of the due process clause.[1] They assert that no liberty interest is involved in the parole decision because it is impossible for an individual prisoner to maintain that he or she is absolutely entitled to release on parole. No such claim can be made, they argue, because the parole decision is "committed to the essentially unfettered discretion of a group of experts" (Brief for United States at 15). The perspective of parole and its place in the criminal justice system upon which this position is based is a serious distortion of reality. A more detailed and accurate picture of the parole system as it exists today will reveal the flaws in the state's and Solicitor General's due process analysis.

[1] "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." Board of Regents v. Roth 408 U.S. at 572. In keeping with this definition, the Court has been vigilant in rectifying deprivations of constitutionally protected liberty. See O'Conner v. Donaldson, 422 U.S. 563 (1975); Jackson v. Indiana, 406 U.S. 717 (1972). It is indeed "paradoxical" (Brief for United States at 17) that the parole release decision, involving as it does nothing less than "elemental freedom from external restraint," Arnett v. Kennedy, 416 U.S. 134, 157 (1974) (Rehnquist, J., opinion announcing judgment) is thought to escape constitutional scrutiny.

This picture will show that parole is a vital part of the process of governmental decisionmaking -- starting with arrest -- that determines the length of confinement for persons involved in the criminal justice system; that, as part of this accepted process, parole is realized by a large majority of prisoners; and that parole is a practice which not only, under Morrissey v. Brewer, 408 U.S. 471 (1972), implicates a constitutionally protected liberty interest but also creates a legitimate claim of entitlement for prisoners that parole will be granted upon a showing adequate under both the explicit and implicit release criteria used by parole boards.

As recounted more fully in the Brief for Petitioner, pp. 21-31, parole is expected -- by legislatures, judges, prisoners, and parole boards -- to be the central process for releasing prisoners from confinement. Under the indeterminate sentencing laws of most states, the parole authority is, in fact, the body that determines the actual length of confinement for a prisoner.[2] In Kentucky, this reality is made explicit:

> "[A]n initial determination of the length of imprisonment for felonies is to be made by the jury trying the issue of innocence or guilt....Once this responsibility of the jury is satisfied, the trial judge has at his disposal the power of modification granted by KRS 532.070 and the power granted by Chapter 533 to substitute probation or conditional discharge in place of imprisonment. If neither of these powers is exercised or one is exercised in a way that immediately or ultimately results in imprisonment, the offender is committed to the Department of Corrections for the maximum term of imprisonment established by the jury. The actual length of imprisonment is determined by the Parole Board ...." Commentary, Kentucky Penal Code, Ky. Rev. Stat. §532.060 (emphasis added).

[2] "[T]he parole implications of a sentence are a necessary and important factor for the consideration of the sentencing judge." United States v. Slutsky, 514 F.2d 1222,1229 196(2d Cir. 1975). This realization has been expressed recently by a number of courts which have considered modifying a defendant's sentence to insure that the individual would be released by the Parole Board at the time contemplated by the court, not later. See United States v. Russo, 535 F.2d 673 (1st Cir. 1976); United States v. Silverman, 406 F. Supp. 862 (D.N.J. 1975); United States v. Manderville 396 F. Supp. 1244 (D. Conn. 1975).

In light of the fact that approximately 60% of the releases of adult felons from Kentucky institutions are through parole (of those who are released, 68% are released following their first appearance before the Board), Kentucky Bureau of Corrections, Office of Statistical Information, Parole Recommendation and Deferment: A Study of the Kentucky Parole Board's Activities for 1973-74 at 1,6 (1975), it vitiates the role of reality in constitutional adjudication to say that "by virtue of his felony conviction the petitoner [h]as been constitutionally deprived of any interest in his own liberty by mandate of law until such time as he ha[s] served the sentence meted out to him, minus good time" (Brief for Respondent at 17). This proposition finds scant support not only in the understanding of the parole process but also in the teaching of Morrissey v. Brewer, 408 U.S. 471 (1971).[3]

In Morrissey, the Court recognized that a prisoner can be deprived of certain aspects of liberty sufficient to invoke due process protection. Because so many elements of the constitutionally protected right to liberty were implicated in the decision to revoke parole, the Court required the Parole Board to abide by minimum standards of due process. This analysis of the parolee's liberty interest in parole underscored the importance of "eschew-[ing] rigid or formalistic limitations on the protection of procedural due process...." Board of Regents v. Roth, 408 U.S. at 172:

> "[T]ermination of parole inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen within the protection of the Fourteenth Amendment." Morrissey v. Brewer, 408 U.S. at 482.[4]

Under this reasoning, the exclusion of the parole release decision from the confines of the Fourteenth Amendment "would be to create a distinction too gossamer-thin to stand close analysis." United States ex el. Johnson v. Chairman N.Y. State Board of Parole, 500 F2d. 925, 928 (2d Cir.), vacated as moot sub nom. Regan v. Johnson, 419 U.S. 1015 (1974)[5].

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[3] In a number of cases, the Court has expressed the awareness that, while a conviction is a constitutionally adequate predicate for imposing confinement as long as life (or imposing death where appropriate safeguards exist, see Gregg v. Georgia, 96 S.Ct. 2909 (1976)), any decision regarding the duration of confinement must be preceded by due process. See Mempa v. Rhay, 389 U.S. 128 (1967); Williams v. New York, 337 U.S. 241 (1949); see also Humphrey v. Cady, 405 U.S. 504 (1972); Specht v. Patterson 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966)

[4] The Solicitor General objects to the characterication of his analytical approach to due process as a revival of the discredited right-privilege distinction (Brief for United States at 23 n.13). Yet, as recognized in Cardaropoli v. Norton, 523 F.2d 990, 995 n.11 (2d Cir. 1975), the similarities are evident. To distinguish solely between "entitlements" and "unilateral expectations" is to create a dichotomy almost as analytically unhelpful as the right-privilege approach. Such an approach fails to include in its analysis an appreciation of the totality governmental function (here, parole release decision making) involved, but instead focuses on state positive law as the sole determinant of constitutional rights. Such an approach, while striving for regularity and consistency (as did the right-privilege distinction) and attempting to avoid recourse to "the loose constellation of constitutionally based values that underlines the analysis of claims of 'liberty' interest in non-prisoner cases" (Brief for United States at 12, 19), contradicts itself by permitting the state to carve out islands of lawlessness in ultimate derogation of the values of regularity and consistency the approach purports to further. Cf. Elrod v. Burns, 96 S.Ct. 2673, 2683 (1976).

[5] Since the decision in Morrissey, only one Court of Appeal has held to the position that due process does not attach to parole release decisions. Brown v. Lundgren, 528 F.2d 1050 (5th Cir. 1976) (2-1 decision), petition for cert. filed, May 7, 1976 (No. 75-1623).

In Meachum v. Fano, 96 S.Ct. 2532 (1976) and Montanye v. Haymes, 96 S.Ct. 2543 (1976), the Court, refusing to "place the [Due Process] Clause astride the day-to-day functioning of state prisons, 96 S.Ct. at 2540, rejected the applicability of due process requirements to intra-state prison transfers. In these cases, the constitutional issue was of a completely different magnitude from the one presented here in two ways. First, a decision regarding continued incarceration was not involved. Unlike a prisoner's "ephemeral and insubstantial," id., interest in movement within a state penal system, the interest that is at stake here embodies "many of the core values of unqualified liberty." Morrissey v. Brewer, 408 U.S. at 482. Second, transfers between institutions often involve questions of institutional security that demand prompt action. These decisions are wholly unlike the decision to grant or deny parole, where decisionmaking places a much greater emphasis on informed principle than on speed.

The respondents' approach also includes in its calculus major reliance on the "unfettered discretion" purportedly accorded parole boards in determining whether to release a prisoner on parole. In essence, it is contended that unless eligibility for parole is clear-cut, any measure of discretion contained in the eligibility decision destroys an individual's "entitlement," and, presumably, converts it into a "unilateral expectation." This notion of discretionary decisionmaking once again is at odds with the way parole boards act in practice.

The fact that many parole administrators have not articulated standards guiding their release decisions does not mean that such standards are not employed. Indeed, as stated by the current Chairman of the United States Parole Board:

> "Without explicit policy to structure and guide discretions, decision-makers, whether parole board members, hearing examiners, or judges, tend to function as rugged individualists. While this may be desirable in our economic system, its suitability for our system of criminal justice is extremely questionable. However, if we can make what we are presently doing explicit and, thus, more consistent, we will be fairer and closer to justice." M. Sigler, Preface in P. Hoffman & D. Gottfredson, Paroling Policy Guidelines: A Matter of Equity (June, 1973) (NCCD Parole Decision-making Project Supp. Rep. 9) (emphasis added).

If it is accepted that parole boards employ implicit criteria in selecting individuals for release, the idea of unfettered discretion cannot be used to suggest that no prisoners are entitled to release. Many plainly are, and the fact that the selection criteria have not been made explicit should not shield parole boards from the limits of the Constitution.[6]

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[6]The fact that most prisoners are paroled supports the argument that, at any given time, a large number of, prisoners are "entitled" to parole, whatever the discretion formally excerised by the parole board. The fact that neither these individuals nor the parole board know who they are in advance of the actual parole decision should not diminish their claims for due process protection. Such a blunderbuss denial of constitutional rights should not be tolerated. Cf. Vlandis v. Kline, 412 U.S. 441 (1973).

Under the system of parole described above, it can be seen that a prisoner's interest in parole is a product of the practices and understanding that have grown out of the body of rules that govern the operation of the parole process. In essence, there is a practice of granting parole upon a finding that certain criteria are met by the prisoner. The fact that these criteria are not all published, or even articulated by all Boards, does not mean that the parole administrators do not rely on such principles in their decisionmaking. In this way, they are little different from administrators who make eligibility decisions regarding welfare or unemployment compensation by applying preconceived criteria to congeries of fact situations. For all of these administrators, it is acknowledged that a measure of discretion is part of their routine.

In this case, the practice of granting parole gives rise to a legitimate claim of entitlement. This occurs because parole is an institutionalized routine of assumedly principled governmental determinations, where a set of criteria are applied to individual situations yielding a given result (parole) upon a finding that an adequate showing was made under the circumstances. Under this system, the prisoner's interest is "secured by 'existing rules and understandings.' [Roth] at 577. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at the hearing." Perry v. Sindermann, 408 U.S. 593, 601 (1972). Just as in Perry with respect to job tenure, there exists in the parole system "an unwritten 'common law,'" id. at 602, that parole is the norm. It is this norm that gives rise to a legitimate claim of entitlement "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." Board of Regents v. Roth, supra, 577.

There are two additional grounds supporting the application of due process in this case. The first, which fits neatly within the bounds of our opponents' theories, rests on the grant of parole eligibility to prisoners. As recognized by the state

(Brief for Respondents at 17), prisoners in Kentucky, after serving a specified portion of their sentence, become eligible for parole under the regulations of the Parole Board. Ky. Admin. Reg. 501, 1:010 §§2-7. Under the analysis advanced by the state and the Solicitor General, this eligibility should be conceived of as entitlement warranting the procedural protections of due process when it is deferred or "divested" (Brief for United States at 21) through an adverse parole decision rendered according to the standards used by the Board. Whether denominated a liberty or property interest, the legitimate entitlement to parole eligibility should qualify for process protection.

A second, independent ground of decision rests on a prisoner's interest not in parole per se but in rational consideration for parole. This ground is anchored in the statutory scheme governing the operations of the Kentucky Parole Board. As detailed in the Brief for Petitoner, pp. 6-8, the Parole Board, in considering whether to grant or deny parole, is required to amass a considerable amount of data on each eligible prisoner,[7]

[7]The board's handling of prisoner records was severely criticized in a report published last May by the Governor's Select Advisory Committee on Prisons. This blue-ribbon panel found: "The content and quality of records submitted to the Parole Board are factors which have contributed to the controversy which led to this aspect of the investigation. The quality of the records submitted is poor. Reports are prepared by caseworkers who are often untrained and poorly supervised. There are so few caseworkers that they could not possibly know all of the inmates assigned to their caseload." The Governor's Select Advisory Committee on Prisons, Report to the Honorable Julian M. Carroll 8 (May 5, 1976). The panel also cited prisoners' inability to have access to the Board's files as a contributing factor to the widespread suspicion among inmates and correctional personnel that Board files are the subject of "inappropriate influence." To dispell these problems in the parole release process, the panel recommended that: (1) through counsel, inmates have access to the records of the deliberations and decisions of the Board; (2)upon rendering its judgment, the Board give a written copy of its decision to each inmate, and (3) inmates be given the right to representation by a lawyer in parole hearings. The panel concluded by noting that "[a]lthough the Board may view such measures as troublesome, these changes would have beneficial results which would offset any inconveniences to the Parole Board." Id. at 10. As yet, no action has been taken on these recommendations.

In marked contrast to the system in Kentucky, the U.S. Parole Board is now required to accord inmates substantial due process protection in parole hearings. Parole Commission and Reorganization Act of 1976, 18 U.S.C. §4201 et seq. These procedural guarantees include access to evidence to be considered at the hearing (with limited exceptions), access to an advocate prior to and during the hearing, a "full and complete record" of the hearing, and a written explanation for denial. 18 U.S.C. §4208.

conduct a hearing, engage in some form of collegial decisonmaking, and promulgate regulations which "shall be in accordance with prevailing ideas of correction and reform." Ky. Rev. Stat. §340(3). This scheme evinces an intention on the part of the Kentucky legislature to provide prisoners with a fair and rational opportunity for parole consideration.[8] Without the safeguards urged by the petitioners, the current process falls far short of the legislature's goal. It can thus be argued that an entitlement to rational decisionmaking has been conferred on prisoners which is abridged by the current practices of the Board.[9]

B. THAT PRISONERS DO NOT PRESENTLY ENJOY CONDITIONAL LIBERTY IS NO BAR TO THE RECOGNITION OF DUE PROCESS RIGHTS IN THE PAROLE RELEASE PROCESS.

As a precondition to the recognition of due process rights, the state argues that "in each and every instance the protections attendant to the Due Process Clause have only been extended where an individual is presently enjoying or is presently entitled to an interest which has been extended to him (Brief for Respondents at 23) (emphasis in original).[10] This purported requirement, however, is not harmony with a number of cases of this Court, the

[8]That the Kentucky legislature did not envision a regime of unbridled discretion distinguishes this case from Board of Regents v. Roth, supra, where the legislature provided no constraints on or guidance whatsoever to the administrators involved in the decision whether to rehire a non-tenured teacher for another year. Roth also turned on the realization that Roth "remain[ed] as free as before to seek another [job]." 408 U.S. at 575. The consequences of an adverse parole decision are clearly more momentous. Moreover, the functional utility of a hearing in Roth was dubious. There can be little doubt but that the university decisionmakers included individuals very familiar with Roth's work and personal qualities. In contrast, the parole decision normally involves a meeting among strangers. Cf. Goss v. Lopez, 419 U.S. 565, 594-95 (1975) (Powell, J., dissenting).

[9]While the legislature has provided a statutory guarantee of fair consideration, it has not "expressly provided also for the procedure by which [parole suitability is] to be determined and expressly omitted the procedural guarantees which [petitioner] insists are mandated by the Constitution." Arnett v Kennedy, 416, U.S. 134, 152 (1974) (Rehnquist, J., opinion announcing judgment). The position of the majority of the Court in Kennedy a fortiori supports petitioners' position here. Id. at 166-67 (Powell, J.), 185(White J.), 210-11 (Marshall, J.).

[10]The Solicitor General does not appear to support the state's insistence on applying a "present enjoyment" test. In fact, he concedes that an applicant for unemployment benefits would be entitled to due process. Brief for United States at 23 n.13.

most recent of which is Hampton v. Mow Sun Wong, 96 S.Ct. 1895 (1976).

There, the Court held that a Civil Service Commission rule barring aliens from positions in the federal service was of sufficient significance to be characterized as a deprivation of liberty which must be accompanied by the due process. No distinction was made between those plaintiffs who held federal employment and were fired and those who had applied and were not hired. Id. at 1899-1900. As recognized in the dissenting opinion of Mr. Justice Rehnquist, id. at 1913-14, the majority opinion rested on a passage from Board of Regents v. Roth, supra, which, in turn, included such cases as Schware v. Board of Bar Examiners, 333 U.S. 232 (1957) and Willner v. Committee on Character, 373 U.S. 96 (1963).[11] In neither of these cases was the applicant "presently enjoying" a status he desired; yet due process requirements were held to apply. Mow Sun Wong's approving citation to these precedents can only be taken as a repudiation of the present enjoyment notion urged by the respondents.

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[11]Another case cited in Roth also is persuasive precedent on this point. In Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926), the petitioner, a lawyer, was denied admission to practice before the Board of Tax Appeals under the discretionary power exercised by the Board. The denial was accomplished without a prior hearing or a statement of reasons. In holding that due process applied to the lawyer's claim of eligibility to practice, it said that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." Id. as 123. This position, and the one assested by the petitioners in this case, rest ultimately on no more controversial a ground than that the discretion of a decisionmaker is a discretion to be exercised under law. See Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961) ("One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law.")

The state construes Wolff v. McDonnell, 418 U.S. 539 (1974) as demanding satisfaction of a present enjoyment test. Such a wooden reading of McDonnell cannot be countenanced. To say that the prisoners there were "presently enjoying" good time credits is to stretch the concept beyond logical limits.

II.

THE RELEASE ON PAROLE OF THE NAMED PETITIONER DOES NOT MOOT THIS ACTION.

As developed below, there are three independent reasons why this action should not be considered moot. Before discussing them, however, it is instructive to reconstruct the events leading to the commencement of this action. Such a brief review will show the both elusiveness and continuing vitality of the issues presented in this case.

Rebuffed in prior attempts -- litigated pro se -- in both state and federal courts to infuse due process strictures into parole release hearings conducted by the Kentucky Parole Board (compare Harrison v. Robuck, 508 S.W. 2d 767 (Ky. 1974) with Ornitz v. Robuck, 366 F. Supp. 183 (E.D. Ky. 1973)), a group of prisoners at the Kentucky State Penitentiary contacted the undersigned counsel, who had litigated other issues against the Kentucky Parole Board (see, e.g., Preston v. Piggman, 496 F.2d 270 (6th Cir. 1974) and Forbes v. Roebuck [sic], 368 F. Supp. 817 (E.D. Ky. 1974)), and requested representation in what became the current action. As part of the preparation for drafting the Complaint, counsel received a number of statements from prisoners then confined at the Kentucky State Penitentiary and Kentucky State Reformatory setting forth grievances these men had against the parole release procedures employed by the Parole Board. Samples of these statements are attached to petitioners' previously filed Response in Opposition to Respondents' Motion to Dismiss. From these original statments, counsel chose Ewell Scott and Calvin Bell to serve as named plaintiffs in the Complaint because their fact situations were considered representative of the class.

As filed, the Complaint named Ewell Scott and Calvin Bell as plaintiffs suing on behalf of the class of Kentucky prisoners subject to the jurisdiction of the Parole Board. Paragraph three of the Complaint (A. 2-3) specifically alleged all the requisites for maintaining a class action pursuant to Fed. R. Civ. P.23

(b)(a). Since the District Court did not permit the Complaint to be formally filed, counsel was precluded from moving to certify the action as required by Fed. R. Civ. P. 23 (c)(1) and proceeded on appeal both to the Sixth Circuit and this Court on the assumption that the class action allegations in the Complaint were well taken. This assumption was grounded in part on language in the Memorandum of the District Court and Order of the Sixth Circuit. both of which acknowledged the class action status of this case.

Upon the granting of certiorari on December 15, 1975, counsel immediately attempted to contact the petitioner Scott only to learn that he had been paroled a mere two and one-half weeks prior.[12] Pursuing their responsibilities as attorneys for the class, counsel contacted Kentucky prisoners who both before and during the course of the lawsuit had contacted them about the issues presented in the case and secured the statements attached to petitioners' previously filed Motion to Substitue Named Petitioners, or, In the Alternative to Intervene. These statements, which set forth the experiences of these prisoners before the Parole Board in the parole release process, are intended to demonstrate, if necessary, that the issues raised in this case continue vitally to affect virtually all prisoners in the Kentucky penal system.

A. DESPITE HIS RELEASE ON PAROLE, THIS CAUSE IS NOT MOOT FOR THE NAMED PETITIONER, WHO MAINTAINS A PRESENT INTEREST IN THE PAROLE RELEASE PRACTICES OF THE PAROLE BOARD.

Although released from prison almost one year ago, the petitioner Scott is still subject to the jurisdiction of the Kentucky Parole Board until 1984. He is, moreover, on close parole supervision, a more restrictive status entailing additional conditions of parole. Although it is to be hoped that the petitioner scrupulously will abide by the terms and conditions

[12]In the same inquiry counsel also learned that the plaintiff Bell had died.

of his parole, the experience of the Kentucky Parole Board shows that he may well be numbered among the approximately one-third of the parolees in Kentucky whose paroles are revoked for any number of potential violations.[13] Should this more than speculative eventuality occur, the petitioner will find himself again before the Parole Board seeking parole.[14]

Whatever role they may play in the petitioner's future, the parole release practices of the Board have played a prominent role in shaping the petitioner's present life. The restrictive status imposed by the Board on the petitioner may not have been imposed had the petitioner been given an opportunity to speak in his own behalf concerning the desirability of the special conditions he currently is abiding by. For example, as a condition of his parole, the petitioner is compelled to undergo outpatient treatment at a local mental health center. Had petitioner had the chance to discuss the benefits he derived from the group therapy programs he had participated in while in prison, the condition of outpatient treatment -- certainly an involuntary intrusion on his life -- may never have been imposed. In this second way, the petitioner maintains a present interest in the outcome of this case.

In In re Sturm, 521 P.2d 97 (Cal. 1974), a constitutional challenge to parole release policies was found not to be moot even though the petitioner in the action -- a non-class action -- was on parole. The Court declared:

> "Although petitioner and the Authority offer conflicting views as to the continued existence of a genuine controversy, this court may entertain the petition notwithstanding that the petitioner is now on parole. Petitioner remains within the constructive control of the Authority even though he has been released from actual physical custody." Id. at 101.

[13]It is the policy of the Board to institute parole revocation proceedings for the alleged commission of "technical" violations of any of the numerous conditions of parole. Cf. Preston v. Piggman, 496 F.2d 270 (6th Cir. 1974).

[14]In Morrissey v. Brewer, 408 U.S. 484 (1972), the harsh realities of parole revocation were recognized by the Court: "Yet, revocation of parole is not an unusual phenomenon affecting only a few parolees. It has been estimated that 35% - 45% of all parolees are subject to revocation and return to prison." Id. at 479.

Similar results have been reached by federal courts in analogous prison cases in recognition of the principle that modification of the custodial status of the named parties should not moot the case. See Ramer v. Saxbe, 522 F.2d 695, 703-05 (D.C. Cir. 1975) ("If the appellees are correct in their apparent position that only persons actually in custody...may press these issues, it may be difficult to find any single plaintiff who would remain eligible to do so throughout lengthy adjudicatory processes."); Workman v. Mitchell, 502 F.2d 1201, 1208 (9th Cir. 1974) ("However meritorious the motive may have been for this transfer [of the named party to another institution], it would be intolerable to permit a defendant, in this manner, to destroy the representative capacity of a named plaintiff."); Morales v. Schmidt, 489 F.2d 1335, 1336 (7th Cir. 1973) ("[T]here is always the possibility that Morales during his period of parole will violate the terms of his conditional release and thus be returned to prison."), aff'd en banc, 494 F.2d 85 (1974).

The petitioner's current parole status distinguishes this case from the situation in Weinstein v. Bradford, 423 U.S. 147 (1975), where the prisoner who commenced the lawsuit was completely released from parole supervision by the time the case reached this Court. On the other hand, in the present case, if the petitioner is not found currently to be affected by the residual effects of the Board's parole release practices, the odds of his again becoming subject to the Board's persisting practices, while by no means certain, are quite real. The simple granting of parole under the circumstances presented here "should not preclude challenge to state policies that have their impact and that continue in force, unabated and unreviewed." Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 126-27 (1975). As he governmental entity most directly affecting the petitioner's daily life, the Kentucky Parole Board should not be immunized from judicial scrutiny simply because it has shifted a person, however temporarily, from one aspect of its operation to another.

B. SINCE THE CONTROVERSY BETWEEN THE PARTIES IS CAPABLE OF REPETITION, YET EVADING REVIEW, THIS ACTION IS NOT MOOT

On a number of occasions, most recently in Nebraska Press Association v. Stuart 96 S.Ct. 2791 (1976), this Court has recognized that if a controversy is capable of repetition, yet evading review, a ruling on the merits of the case is warranted even though the underlying dispute between the parties that led to the initiation of the lawsuit becomes dormant. See, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Carroll v. Princess Anne, 393 U.S. 175, 178-79 (1968). In the present case, the realistic chances of the petitioner Scott again becoming subject to the parole release jurisdiction of the Parole Board already have been recounted. As discussed, the reappearance of the petitioner before the Parole Board certainly is as likely as the repetition of the short-term order in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911), or the reinstitution of proceedings seeking to remove the plaintiffs from the welfare rolls in Goldberg v. Kelly, 397 U.S. 254 (1970).

Besides being capable of repetition, the controversy in this case presents a classic example of an issue which has evaded the plenary review of this Court. On three prior occasions (Bradford v. Weinstein, 519 F. 2d 728 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975); Johnson v. Chairman, New York State Board of Parole, 500 F.2d 295 (2d Cir.), vacated as moot sub nom. Regan v. Johnson, 419 U.S. 1015 (1974); and Scarpa v. U.S. Board of Parole, 477 F.2d 278 (5th Cir.), remanded for consideration of the question of mootness, 414 U.S. 809, vacated as moot, 501 F.2d 992 (1973)), the Court, on the grounds of mootness, declined to address issues indentical to the ones presented here. Failure to resolve these issues in this case would only continue the kind of judicial merry-go-round the capable of repetition, yet evading review principle was designed to stop.

C. UNDER THE STANDARDS ENUNCIATED IN SOSNA V. IOWA, 419 U.S. 393 (1975) AND GERSTEIN V. PUGH, 420 U.S. 103 (1975), THIS CASE -- A CLASS ACTION -- IS NOT MOOT.

In Sosna v. Iowa, 419 U.S. 393 (1975), a controversy no longer alive as to the named plaintiff, an individual challenging a durational residency requirement for divorce, was found to be not moot for the class of persons the named plaintiff represented. Three factors were specified to guide the mootness inquiry: (1) whether the suit was certified as a class action, (2) whether a continuing controversy existed between the defendant and the members of the class; and (3) whether the controversy was capable of repetition, yet evading review. Determining that these factors were satisfied in Sosna, the Court turned from the issue of mootness to the question of the adequacy of representation under Fed. R. Civ. P. 23(a). On this point it found that "in the present suit, where it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance, and where the interests of the class have been competently urged at each level of the proceeding, we believe that the test of Rule 23(a) is met." Id. at 406.

Applying the mootness test expounded in Sosna, the Court in Gerstein v. Pugh, 420 U.S. 103 (1975), held that, in a case challenging the constitutionality of certain pretrial detention procedures, the release from custody of the named plaintiffs did not moot the action. The reasoning employed by the Court should be used interchangeably to resolve the mootness issue in this case:

> "Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'
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> At the time the complaint was filed, the name respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under Sosna. But this case is a suitable exception to that requirement. See Sosna, supra, at 402 n. 11; cf. Rivera v. Freeman, 469 F.2d 1159, 1162-1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case." Id. at 110-111, n.11.

Except for one factor, discussed more extensively below, the present case satisfies all the explicit criteria of Sosna and Pugh:

(1) There remains a live controversy between the members of the class and the Parole Board. As the statements attached to petitioners' Motion to Substitute show, there is grave dissatisfaction with the parole release procedures of the Board, and there has been for sometime. See Harrison v. Robuck, 508 S.W.2d 767 (Ky. 1974) and Ornitz v. Robuck, 366 F. Supp. 183 (E.D. Ky. 1973). This distinguishes the present case from Indianapolis School Commissioners v. Jacobs, 420 U.S. 128 (1975), where it appeared that a continuing controversy -- at least one sufficient for Art. III, §2 purposes -- no longer existed between the defendants and the remaining members of the class.

(2) The issues in this case are paradigms of those that are capable of repetition, yet evading review.

(3) As in Pugh, "the constant existence of a class of persons suffering the deprivation is certain" and it is undisputed that the attorneys representing the named petitioner "ha[ve] other clients with a continuing live interest in the case." Pugh, supra at 110-111 n.11.

(4) The named representative will fairly and adequately protect the interests of the class. In this case, as in Sosna, "it is difficult to imagine why any person in the class appellant represents could have an interest in seeing [the current parole release practices of the repondents] upheld." Sosna, supra at 403 n.13.

The only factor preventing this case from falling squarely within the confines of Sosna and Pugh is the fact that, although treated as a class action, this case never was formally certified by the District Judge, who did not permit the Complaint to be filed in forma pauperis. This factor, however, should not, under the circumstances presented here, present a barrier to the Court addressing the merits of this cause. First, there is a justifiable reason why no formal certification of the class was obtained: the District Judge precluded certification by dismissing the Complaint sua sponte. To moot this cause now because of an occurrence wholly outside the control of the litigants would not further any of the salutary purposes underpinning the mootness doctrine. Second, although not formally certified, this cause was treated as a class action by both the District Court and the Court of Appeals. Third, strong support for petitioners' position comes from a line of federal cases holding that subsequent events rendering a case moot as to the named party in a case initiated as a class action, though not officially certified, does not affect the justiciability of the case for the remainder of the class. The leading case on this point is Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969), aff'd sub nom. Wyman v. Bowers, 397 U.S. 49 (1970). There, in a case challenging the constitutionality of a welfare durational residency requirement, the absence of formal class certification did not prevent the court from holding that, despite the resolution of the named plaintiffs' claims, the suit was not moot, and new named members of the class could intervene. Pertinently, the Court observed:

> "When the action was commenced, however, Gaddis was properly a representative of the purported class. To say that the whole action is mooted simply because it may be moot as to the named plaintiff would be contrary to the express purpose of Rule 23(e), which prohibits dismissal or compromise of a class action if the result would be to injure the other members of a purported class." Id. at 715.

Even though, as here, the class never officially was certified, the court found that in the interim between filing and certification the case must be assumed to be a class action: "A holding that an action commenced as a class action retains that character until a Court finds otherwise is supported by the Advisory Committee's note on the 1966 amendments to Rule 25." Id. See J. Moore, Federal Practice §23.50, at 23-1103 (2d ed. 1969). For other cases employing similar reasoning and reaching a similar result, see: Jones v. Diamond, 519 F.2d 1090, 1097-99 (5th Cir. 1975); Cruz v. Hauck, 515 F.2d 322, 325 n.1 (5th Cir. 1975); Frost v. Weinberger, 515 F.2d 57, 62-65 (2d Cir. 1973); Huff v. N.D. Cass Company of Alabama, 485 F. 2d 710, 713 (5th Cir. 1973) (en banc); Mick v. Sullivan, 476 F. 2d 973 (4th Cir. 1973); Kahan v. Rosenstiel, 424 F. 2d 161 (3d Cir. 1970); Cypress v. Newport News Gen. & Non-Sectarian Hosp. Ass'n., 375 F. 2d 648, 667 (4th Cir. 1967) (en banc); Brown v. Liberty Loan Corporation of Duval, 392 F. Supp. 1023 (M.D. Fla. 1974); La Reau v. Manson, 383 F. Supp. 214 (D. Conn. 1974); Gatling v. Butler, 52 F.R.D 389 (D. Conn. 1971); Vaughan v. Bower, 313 F. Supp. 37, 40 (D. Ariz.) (3-judge ct.), aff'd 400 U.S. 884 (1970).

D. UNDER THE SPECIAL CIRCUMSTANCES PRESENTED IN THIS CASE, EFFECTIVE JUDICIAL ADMINISTRATION AND FIDELITY TO THE INTENT OF FED. R. CIV. P. 23 COUNSEL THAT PETITIONERS' MOTION FOR LEAVE TO SUBSTITUTE NAMED PETITIONERS, OR, IN THE ALTERNATIVE, TO INTERVENE BE GRANTED.

Although it is urged that this action is not moot under the current state of the record, the petitioners have filed -- out of an abundance of caution -- a motion, pursuant to Fed. R. Civ. P. 21, 23, and 24, seeking to substitute, add, or intervene with additional prisoners currently incarcerated in Kentucky and immediately subject to the parole release jurisdiction of the Kentucky Parole Board. The motion primarily is bottomed on the procedure approved in Mullaney v. Anderson, 342 U.S. 415 (1952), where the Court sustained a motion to add party plaintiffs filed to meet a suggestion by the defendants that the named party in the case did not have standing to maintain the suit. Specifically, the defendants alleged that the named parties -- a union and its officials -- did not have standing to sue on behalf of non-residents union members in an action challenging a license fee imposed by the Territorial Legislative of Alaska. To quell this allegation, the plaintiffs sought to add two non-resident union members. Relying on Fed. R. Civ. P. 21, the Court granted the

motion; Justice Frankfurter's reasoning is equally applicable to the present case:

> "This addition of these two parties plaintiff can in no wise embarrass the defendant. Nor would their early joinder have in any way affected the course of the litigation. To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration...." Id, at 417.

On this authority alone, petitioners' motion should be granted. See also Rogers v. Paul, 382 U.S. 198 (1965); Benson v. State of California, 328 F.2d 159 (9th Cir. 1964); McCausland v. Shareholders Mgt. Co., 52 F.R.D. 521 (S.D.N.Y. 1971).

III.

THIS ACTION, WHICH DOES NOT SEEK TO AFFECT THE DURATION OF THE PETITIONERS' CONFINEMENT BUT SEEKS ONLY PROSPECTIVE INJUNCTIVE RELIEF, IS PROPERLY COGNIZABLE UNDER 42 U.S.C. §1983.

Relying on Preiser v. Rodriguez, 411 U.S. 475 (1973), the respondents argue (Brief for Respondent at 9-10) that the petitioners' complaint should be treated as a petition for a writ of habeas corpus under 28 U.S.C. §2254, rather than as a civil rights action cognizable under 42 U.S.C. §1983. As a habeas action, they urge that the petitioners be required to exhaust their state remedies prior to reinstituting this action in federal court. This argument finds no support either in Rodriguez or in the settled interpretation of 28 U.S.C. §2254. See Bradford v. Weinstein, 519 F.2d 728, 733-35 (4th Cir. 1974).

A. THE EXHAUSTION REQUIREMENT OF 28 U.S.C. §2254(b), AS CONSTRUED IN PREISER v. RODRIGUEZ, DOES NOT EXTEND TO A SUIT SEEKING ONLY TO AFFECT THE PROCEDURE OF FUTURE PAROLE HEARINGS.

The opinion in Rodriguez espouses three propositions, all relevant to state's contention. First, the Court reaffirmed its earlier decisions holding that there is no judicial requirement of exhaustion of state remedies in suits under the Civil Rights Act of 1871, 42 U.S.C. §1983 (411 U.S. at 477). Second, the Court similarly reaffirmed the principle that a §1983 action was available to state prisoners no less than to others complaining of unconstitutional conduct engaged in under color of state law, and that there was to be no general rule that the special problems of federal involvement in state prison administration warranted an exhaustion requirement in prisoner suits under §1983 (411 U.S. at 498-99). Third, the Court held that a prisoner "challenging the very fact or duration of his physical imprisonment, and... [seeking] a determination that he is entitled to immediate release or a speedier release" (411 U.S. at 500) (emphasis added), may not avoid the exhaustion requirement of the habeas corpus

statute by basing the action on §1983 instead.[15] Where the action is "close to the core" of habeas corpus (411 U.S. at 489), the Court held, the "specific determination" of Congress (411 U.S. at 490) that habeas corpus relators first exhaust state judicial remedies must be respected regardless of the plaintiff's choice of jurisdictional base. In light of these propositions, it is evident that Rodriguez was carefully grounded in "explicit congressional intent" (411 U.S. at 489) and did not attempt, as the state does, to convert the exhaustion requirement from a legislative one involving habeas corpus to a judicial one involving state prisoners.

Subsequent decisions support this analysis. In Wolff v. McDonnell, 418 U.S. 539 (1974), the Court held that Rodriguez, while barring an attack on the forfeiture of good-time credits by reason of allegedly unconstitutional disciplinary proceedings, did not require exhaustion as to an attempt to obtain "an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations." Id. at 555. In Gerstein v. Pugh, 420 U.S. 103 (1975), Rodriguez was held inapplicable to a claim by arrestees that they were constitutionally entitled to a judicial determination of probable cause for pretrial detention:

> "Respondents did not ask for release from state custody.... They asked only that the state authorities be ordered to give them a probable cause determination.... Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy." Id. at 107 n.6.

The foregoing passage from Pugh is fully applicable to the challenge mounted in this case; indeed, with words such as "constitutionally adequate parole hearing" substituted for "probable cause determination," it describes this case. Although in both the ultimate motive for the prisoner's challenge is to enhance the likelihood of future release, that insight does not convert this proceeding into a challenge to confinement as contemplated by Rodriguez. The Complaint here, as in McDonnell, asked only for declaratory and prospective injunctive relief (A.8). It cannot be said that the petitioner is using §1983 as a pretext to avoid the exhausion requirement of the habeas corpus statute. The legislative judgment requiring exhaustion, therefore, is not at risk. That is all that Rodriguez properly sought to protect.

B. SECTION 2454(b), EVEN IF IT WERE APPLICABLE, WOULD NOT REQUIRE EXHAUSTION IN THIS CASE, BECAUSE PURSUIT OF STATE REMEDIES WOULD BE FUTILE.

Section 2454(b), by its own terms, provides that exhaustion is not required where "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner" (emphasis added). As mentioned above, p. , prisoners in Kentucky have availed themselves of the only state route -- a declaratory judgment action --available to challenge the constitutional adequacy of the procedures employed by the Kentucky Parole Board in parole release hearings. That challenge was singularly unsuccessful.

In Harrison v. Robuck, 508 S.W. 2d 767 (Ky. 1974), in response to a prisoner's allegation that the Parole Board "abuse[d] their discretion" by denying him, among other safeguards, a statement of reasons upon refusing to grant parole, the high Court in Kentucky flatly rejected any notion that due process procedures belong in the parole release process. The Court relied on the broad discretionary powers vested in the Board by the legislature and stated that it was "unwilling to impose more stringent procedural requirements on the Parole Board than are required of analogous administrative agencies." Id. at 768. To require these petitioners to return to the state courts with their present claims would be an exercise in futility. Section 2254(b) is, therefore, satisfied. See e.g., Evans v. Cunningham, 335 F.2d

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[15] 28 U.S.C. §2254(b) provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstnaces rendering such process ineffective to protect the rights of the prisoner."

...) (4th Cir. 1964); Developments in the Law -- Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1098-1100 (1970).[16]

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[16] Although not raised by the state, the Solicitor General claims that a substantial question exists whether this action should have been heard by a three-judge court pursuant to 28 U.S.C. §2281. This submission, based as it is on a technical statute which is to be strictly construed, see, e.g., Gonzales v. Automatic Employees Credit Union, 419 U.S. 90 (1974); Board of Regents of the University of Texas System v. New Left Education Project, 404 U.S. 541, 545 (1972), cannot withstand scrutiny under the facts of this case. First, the petitioners here do not challenge a specific statute, regulation, policy, or practice. What is complained of is the absence of such a policy or regulation. The petitioners are seeking to fill a vacuum that the Parole Board has not filled. Even under a generous definition of the concept of policy or practice, the practices of the Parole Board in release hearings are "simply amorphous." Leonard v. Mississippi State Probation and Parole Board, 509 F.2d 820, 823 (5th Cir. 1975). This insight is implicit in the decisions of other Circuits on the issue presented here, e.g. Bradford v. Weinstein, supra; United States ex rel. Johnson v. Chairman, New York State Board of Parole, supra; Dorado v. Kerr. 454 F.2d 892, 895 (9th Cir. 1972), none of which was rendered by a three-judge court See also Baxter v. Palmigiano 96 S.Ct. 1551, 1555 n.2 (1976).

Second, practices of administrative officers which are not clearly mandated by a statute or a regulation do not require the convening of a three-judge court. The statute "precludes a reading which would bring within its scope every suit to restrain the conduct of a state official, whenever, in the ultimate reaches of litigation, some enactment may be said to authorize the questioned conduct." Phillips v. United States, 312 U.S. 246, 253 (1941).

Third, the granting of the injunctive relief requested here would not result in the "improvident state-wide doom by a federal court of a state's legislative policy." Phillips v. United States, supra at 251. It hardly needs saying that there is no state legislative policy to deny due process to petitioners. Simply requiring administrative officers to comply with constitutional mandates in the course of effectuating a state statute is not a challenge to the statute within the province of §2281. See Pitts v. Knowles, 339 F. Supp. 1183 (W.D. Wis. 1972), aff'd 478 F.2d 1405 (1973).

Fourth, even if the injunctive relief requested here should properly have been before a three-judge court, the declaratory relief requested could properly be heard by a single district judge. See Kennedy v. Mendoza - Martinez, 372 U.S. 144, 154-55 (1963). Lack of jurisdiction over the request for injunctive relief would not destroy the court's jurisdiction over the prayer for declaratory relief. That portion of the case, therefore, is properly before this Court.

Fifth, in a real sense, the treatment of the suit by the district court mooted the question of the propriety of convening a three-judge court. It is established that a single district judge may dismiss a complaint if it raises insubstantial constitutional issues, Ex Parte Poresky, 290 U.S. 30, 31-32 (1933). In such a case, the proper route of appeal lies to the Court of Appeals and then to this Court. MTM. Inc. v. Baxley, 420 U.S. 799 (1975). The evolution of this litigation properly brings before this Court the question of the substantiality of the constitutional issues raised in the Complaint.

Finally, under The Three-Judge Court Amendments, Pub. L. No. 94-381 (Aug. 12, 1976), Congress articulated a national policy limiting the convening of three-judge courts to a specific class of cases. Under the amendments, the issues raised in this case would not require the convening of a three-judge court.

CONCLUSION

For the foregoing additional reasons, the judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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No. 74-6438

In the Supreme Court of the United States

OCTOBER TERM, 1975

EWELL SCOTT, PETITIONER

v.

KENTUCKY PAROLE BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the question whether a prisoner's application for parole implicates the procedural protections of the Due Process Clause.[1]

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[1] We do not discuss whether petitioner should be allowed to substitute new parties in this Court. Cf. *Rogers* v. *Paul*, 382 U.S. 198, 199. If substitution is not allowed, however, this case is apparently moot, for petitioner was released on parole on November 26, 1975. See *Weinstein* v. *Bradford*, No. 74-1287, vacated as moot, December 10, 1975; *Preiser* v. *Newkirk*, 422 U.S. 395.

INTEREST OF THE UNITED STATES

This case involves the question whether a prisoner's application for parole, during a period of eligibility, implicates the procedural protections of the Due Process Clause. For the reasons that we discuss below, we believe that a prisoner's unilateral expectation that the Board will exercise its discretion in his favor is neither a "liberty" nor a "property" interest within the meaning of that Clause, and consequently that the responsibility for evaluating and implementing the procedures to be followed in considering applications for parole is entrusted to the provinces of the federal and state legislatures and executives. A contrary decision by this Court would affect the constitutional context in which the federal parole system operates.

1. The United States maintains an extensive parole system. In 1975 the United States Board of Parole made 10,998 final parole decisions concerning adult prisoners, and granted parole in 5,316, or slightly less than half, of the cases.[2]

Under the Board's regulations (28 C.F.R. Part 2 (1975), as amended, 40 Fed. Reg. 41328-41342; see Pet. Br. App. C), a prisoner's application for parole is accorded substantial procedural protection. Application forms are provided to each prisoner eligible for parole. Each prisoner also receives an Inmate Background Statement, which he can return to the Board

[2] This information has been derived by the Board of Parole from unpublished data.

to present his version of the factors the Board should consider. Although the regulations do not require a hearing on every application, we are informed by the Board that hearings are granted as a matter of course. The prisoner is given written notice of the time and place of the hearing. Before the hearing, he is entitled to review his central file, including classification and disciplinary reports. He is entitled to be represented at the hearing by a person of his choice.

The initial parole hearing is conducted by a panel of two examiners designated by the Board. The panel discusses with the inmate the factors it considers in acting on his application, including the facts relating to his offense, his prior criminal record, his personal history and institutional experience, changes in his motivation and behavior, and his release plans. The Board has prescribed objective guidelines indicating the customary range of time to be served before release for various combinations of these factors. The inmate's representative may respond to the panel's questions during the hearing and may offer a statement at the conclusion.

If parole is denied, the prisoner is furnished in most cases with a "guideline evaluation statement," which sets forth the factors upon which the Board relied and shows the Board's evaluation of those factors in the prisoner's case.

The prisoner may appeal an adverse panel decision

to the Regional Director. The prisoner may not appear at the appellate hearing, but attorneys, relatives, and other interested parties may appear at the discretion of the Director. The Regional Director's decision can be appealed to the National Appellate Board. The National Appellate Board's decision is final.

2. These parole procedures are unlikely to be directly affected by the outcome of this case. The interest of the United States in this case is more general: to defend the prerogatives of Congress and the Executive to reconsider, determine, and implement the procedures that govern consideration of applications for parole.

Current statutes delegate absolute discretion to the Board of Parole to decide whether a prisoner shall be paroled. See 18 U.S.C. 4202 and 4203. The Board's present hearing and release guidelines and procedures were developed by the Board after a careful three-year study conducted by the National Council on Crime and Delinquency and an analysis of the results of a pilot project begun in October 1972 in one of the Board's regions. If this Court should hold that the Due Process Clause governs consideration of applications for parole, future experimentation and alteration could be hindered or precluded. Moreover, the United States is considering making substantial changes in the parole system. H.R. 5727, 94th Cong., 2d Sess., was passed by the Senate on March 2, 1976, by the House on March 3, 1976, and has

been transmitted to the President, who has not yet (as of March 10, 1976) acted upon the bill.[3] The

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[3] H.R. 5727 would abolish the Board of Parole and create a "United States Parole Commission" as an independent agency within the Department of Justice. The bill provides that any prisoner would be eligible for parole after one-third (or ten years, whichever comes first) of his sentence. The bill would amend 18 U.S.C. 4206 to provide that "[i]f an eligible prisoner has substantially observed the rules of the institution * * * to which he has been confined, and if the Commission * * * determines" that his release would not depreciate the seriousness of his offense or promote disrespect for the law, and that "release would not jeopardize the public welfare," the prisoner "shall be released." This provision would be qualified by Section 4206(c), which would allow the Commission to "grant or deny release on parole notwithstanding the guidelines referred to * * * [above] if it determines there is good cause for so doing." In order to exercise this discretion the Commission must give the prisoner a written notice of the reasons for the decision and must provide the prisoner "a summary of the information relied upon." After serving two-thirds of his sentence (or 30 years, whichever comes first) a prisoner "shall" be released without respect to the criteria already described, except that "the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules or regulations or that there is a reasonable probability that he will commit any * * * crime." Under the argument we present at pages 17-29, *infra*, H.R. 5727 therefore would establish a constitutionally protected interest in release from prison after an inmate has served two-thirds (or 30 years) of his sentence; he could not be retained longer in prison without procedures designed to facilitate accurate determination of the facts upon which release could be withheld. Prior to that time, however, the Commission would possess complete discretion over the grant or denial of parole, subject only to the "guidelines" enumerated and to its obligation (under proposed Section 4206(c)) to give notice and provide a factual summary.

H.R. 5727 itself establishes procedures more comprehensive

Attorney General has suggested that serious consideration should be given to abolishing parole and replacing it with a system of mandatory release after a period of good behavior.[4] The power of Congress to choose among proposed release systems could be substantially affected by the outcome of this case.

Many other types of decisions affecting prisoners, such as those concerning eligibility for work-release programs and furloughs, involve opportunities for prisoners to acquire some "conditional liberty" at the discretion of penal authorities. Similarly, many decisions that do not involve a temporary release from incarceration may nevertheless involve greater liberty within the institution—decisions relating to placement in a particular prison, security classification, and work assignments are but a few of many exam-

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than would be required by the Due Process Clause. The bill provides that each inmate shall be afforded a personal hearing at least every two years on and after the date of his eligibility for release. He is entitled to appear in person and to testify; he may be accompanied by a representative; the Commission must give him notice of the hearing and make available to him any file or report to be used in making its decision. A record of the hearing would be kept and, if parole is denied, the prisoner would be entitled to a personal conference with the responsible examiner or Commissioner at which the reasons for denial would be explained.

[4] Address by the Attorney General before the Governors' Conference on Employment and the Prevention of Crime, February 2, 1976. Maine has adopted a program similar to that proposed by the Attorney General. See Maine Revised Statutes Annotated, Title 17-A, § 1254 (effective March 1, 1976). Other States are considering legislation to the same effect.

ples.[5] The Court's resolution of the question presented here could have significant implications for the institutional handling of such "housekeeping" decisions.

STATEMENT

Kentucky allows most prison inmates to apply for parole upon completion of a specified portion of their sentences. State law commits the decision whether to grant parole to the discretion of the Kentucky Parole Board. Kentucky Rev. Stat. §§ 439.320, 439.330 and 439.340 (1973). The Parole Board has not bound itself by express or implied rules to grant parole in any particular case. It retains discretion over all applications, and no specific set of facts will entitle an individual to be paroled. See Pet. Br. 9-10, 5a-6a; *Harrison* v. *Robuck*, 508 S.W.2d 767 (Ky.).

Petitioner is an inmate in the Kentucky state prison system who was considered for and denied immediate parole. On February 15, 1974, petitioner and Calvin Bell, who also had been denied parole, brought a class action under 42 U.S.C. 1983, asserting that the State had not used constitutionally adequate procedures in considering their parole applications (App. 2-9). The

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[5] See, *e.g.*, *Montanye* v. *Haymes*, No. 74-520, certiorari granted, 422 U.S. 1055 (institutional placement); *Meachum* v. *Fano*, No. 75-252, certiorari granted, December 8, 1975 (same); *Cardaropoli* v. *Norton*, 523 F.2d 990 (C.A. 2) (institutional status designation); *Lokey* v. *Richardson*, C.A. 9, No. 74-1256, decided December 9, 1975 (security classification); *Carlo* v. *Gunter*, 520 F.2d 1293 (C.A. 1) (same); *United States ex rel. Myers* v. *Sielaff*, 381 F. Supp. 840 (E.D. Pa.) (application for discretionary furlough).

complaint stated that, although petitioner had an opportunity to meet with the Parole Board after advance notice (App. 4-5), he was not allowed to present evidence, to be represented by counsel, or to see or rebut any evidence upon which the Parole Board may have relied (App. 5). The complaint also stated that the Parole Board rarely announces reasons for its decisions to grant or deny applications for parole (App. 5-6) and that it has not announced any standards or rules governing the exercise of its discretion to pass upon applications (App. 3, 5, 7).

The district court refused to certify the case as a class action and denied the individual claims for declaratory and injunctive relief (App. 14-16).[6] The

[6] There is a substantial question whether this case is properly before the Court. Petitioner's civil rights action sought an injunction that would have directed respondents to promulgate rules for the conduct of parole release hearings meeting at least nine criteria that the complaint asserted are established by the Constitution (App. 8-9). Constitutional challenges seeking injunctions against state statutes and regulations of statewide applicability must be heard by district courts of three judges. 28 U.S.C. 2281. Many of the prison due process cases that have been considered by this Court have been heard on appeal from a three-judge district court. See, *e.g.*, *Pell* v. *Procunier*, 417 U.S. 817; *Procunier* v. *Martinez*, 416 U.S. 396. (Other cases arose in *habeas corpus*; no injunction was sought.)

Many of petitioner's constitutional arguments expressly challenge the validity of state statutes and of the regulations (Pet. Br. 1a-8a) promulgated by the Kentucky Parole Board. In an exhaustive discussion of the applicability of Section 2281 to due process challenges to prison conditions, the Fifth Circuit has unanimously held *en banc* that in situations of this sort a three-judge court must be convened. *Sands* v. *Wainwright*, 491 F.2d 417, certiorari denied *sub nom. Guajardo* v. *Estelle*, 416 U.S. 992. Even if the statewide practices under attack are simply authorized or permitted by state statutes or regulations rather than compelled by them, a three-judge court still would appear to be required. See *Sands* v. *Wainwright*, *supra*, 491 F.2d at 427-429; *Gilmore* v. *Lynch*, 400 F.2d 228 (C.A. 9), certiorari denied, 393 U.S. 1092; *McCarty* v. *Woodson*, 465 F.2d 822 (C.A. 10). Cf. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290, 292. But cf. *Phillips* v. *United States*, 312 U.S. 246. See generally Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 50 (1964).

district court held that the Due Process Clause does not apply to the consideration of applications for parole. The court of appeals affirmed, concluding that "the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution * * *" (App. 21).

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner's presentation reflects the understanding that parole release decisions are of great importance in the life of a prisoner, and the belief that it is concomitantly important that such decisions be made only after studied deliberations and procedures calculated to minimize the chance that a denial of parole will be based upon misapprehensions of fact or mistaken judgment. There is much to be said for that view, and the federal Board of Parole now provides hearings calculated to solicit the views of prisoners and to keep them informed of the standards by which decisions will be made and the reasons for the decision in their particular case.

The result for which petitioner argues therefore may accord with "enlightened public policy." But the question here is not the wisdom of the result but rather whether the task of defining and implementing "enlightened public policy" with regard to parole proceedings is vested by the Constitution in the legislative and executive branches, or rather in the courts under the Due Process Clause. That hearings or other formal procedures may improve the comprehensiveness and accuracy of a parole board's fact-gathering and decisionmaking functions does not answer this question, for there is no abstract constitutional right to be free of procedures that entail significant risks of error. Due process rights are implicated only when a constitutionally protected interest in liberty or property is at stake.

Legislatures and administrators, as well as courts, strive to be sensitive to the needs and desires of prison inmates. Congress has transmitted to the President a bill that would make major changes in the federal parole system (see note 3, *supra*) and, over a lengthy period of investigation and experimentation, the federal Board of Parole has devised procedures, including a personal hearing, that it believes strike a fair balance between the legitimate interests of the inmates and the needs and objectives of the institution. Kentucky also affords a personal hearing, but other of its procedures differ from those used by federal authorities. As we learn more about the results of the procedures now in use, or as ideas concerning the role of prisons in our society evolve,

still other procedures may come to appear superior to those now in use. We believe that the choice of procedures is constitutionally within the province of the legislature and the executive, which have the better opportunity to study the procedures in use and evaluate their merits and demerits.

We do not know which parole release process is best; indeed, social science research is barely adequate to enable us to frame the question. The needed knowledge can be acquired, if at all, only by a painstaking process of experimentation, change, trial, and error, similar to that in which the federal Board of Parole is now engaged.[7] What is more, perceptions of the role of imprisonment itself, and the objectives it can accomplish, can be expected to change (compare Wilson, *Thinking About Crime* (1975), with Morris, *The Future of Imprisonment* (1974)) and, as these perceptions change, our ideas about the proper role of parole and the proper way to go about deciding when to grant parole may change with them.[8] The Attorney

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[7] Cf. *United States ex rel. Gereau* v. *Henderson*, 526 F.2d 889, 897 (C.A. 5) ("[w]ith all of the complexities of penology, sociology and criminology, much of which is in a state of undulating flux even for those expert in the field, courts and judges are not equipped to decide [where a prisoner should be confined]. Obviously, no due process hearing is called for in selecting the institution of confinement * * *").

[8] As Judge Friendly has pointed out, there is nothing either suspect or improper—except a poor choice of name—about the "inquisitorial" method of investigating cases and making decisions. That method, which Kentucky has adopted, may be better suited to classes of cases involving "mass justice" than is the adversarial model, involving as it does substantial

General has suggested that discretionary parole might be replaced by a program of mandatory early release upon good behavior—a program Maine has recently adopted and that other States are considering. See also Sigler, *Abolish Parole?*, 39 Fed. Prob. 42 (June 1975). Decisions on these and other similar questions are best left to society at large and to the representatives they elect, unless the Constitution requires otherwise. We do not believe it does in this case.

A. Petitioner's claim to more elaborate parole procedures rests upon the Due Process Clause of the Fourteenth Amendment. But that Clause applies only in those circumstances where governmental action threatens to deprive an individual of "liberty" or "property." Thus the evaluation of petitioner's claim must begin with an inquiry into whether the denial of parole deprives petitioner of a constitutionally protected liberty or property interest.

B. Denial of parole does not deprive a prisoner of liberty in the constitutional sense. He was lawfully deprived of his liberty upon conviction, sentence, and incarceration. Certainly a prisoner has an "interest" in securing his release on parole. But a prisoner's generalized interest in freedom from confinement is not, without more, constitutionally cognizable as a "liberty" interest. The loose constellation of constitutionally based values that underlies the analysis of claims of "liberty" interests in non-prisoner cases

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quantities of person-to-person argumentation. See Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1289-1291 (1975).

does not, by and large, pertain to persons lawfully confined.

In other words, a prisoner's legally protected interests relating to release derive not from constitutional concepts of liberty but from the statutes, regulations, and rules that govern the terms of his confinement. At least where the question relates only to release and not to conditions of confinement, a prisoner has no constitutionally protected liberty interest apart from his legitimate claims of entitlement under those statutes, regulations, and rules.

This Court's decisions make it clear that a legitimate claim of entitlement warranting the procedural protections of due process exists only when the State has bound itself to take, or refrain from taking, specified actions on the basis of determinable facts. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

It is likewise clear that a legitimate claim of entitlement arises only from positive law and not from the individual's unilateral expectation.

C. Under Kentucky law, the decision whether to grant or deny parole is completely discretionary. No set of facts petitioner could prove or attempt to prove would entitle him to parole. Because the decision whether to grant parole is not determined by any par-

ticular controvertible facts but instead is discretionary, petitioner could under no circumstances have a legitimate claim of entitlement to release on parole. Accordingly, petitioner has no constitutionally protected liberty or property interest in being released. Petitioner's only "interest" is a hope, desire, or expectation to be released. But the Constitution does not require that any particular procedures be used by the State before it acts to disappoint an individual's unilateral expectation.

ARGUMENT

UNDER THE KENTUCKY EARLY RELEASE SYSTEM, A PRISONER'S APPLICATION FOR PAROLE DOES NOT IMPLICATE THE PROCEDURAL PROTECTIONS OF THE DUE PROCESS CLAUSE

Parole is a statutory creation. The rules under which a prisoner is entitled to be considered for parole are designed by each State and, for federal prisoners, by Congress. A State could design a parole system under which every prisoner became entitled to early release if he could demonstrate particular facts—for example, good behavior while in prison.[9] In our view, the procedural protections of due process would attach to such an entitlement.

But Kentucky and the United States have not created such an entitlement to parole. Instead, they

[9] Such a design is used for the federal good time credit system; every prisoner is entitled to good time credits that can be withdrawn only on account of misbehavior. See 18 U.S.C. 4161 and 4165.

have committed to the essentially unfettered discretion of a group of experts the decision whether an inmate should be returned to society at some date before the expiration of his sentence as reduced by good time.[10] The use of such a discretionary system of parole no doubt causes each prisoner to hope or even to expect (whether or not such an expectation is objectively warranted) that he will be among those granted an early release. But unless the parole authorities are required to release the prisoner upon a finding of particular facts, the prisoner's hope to be released is no more than a unilateral expectation. As we now show, a State need not provide any particular form of procedure before it acts to disappoint such an expectation.

A. The Procedural Protections Of The Due Process Clause Apply Only To Proceedings That May Result In The Deprivation Of An Individual's "Liberty" Or "Property"

The procedural protections of the Due Process Clause do not extend generally to all situations in which governmental action or inaction may be adverse to the interests of a particular individual or group. By its terms, that Clause applies only in those circumstances where governmental action threatens to deprive an individual of "liberty" or "property." [11]

[10] But see note 3, *supra*.

[11] We need not here discuss the special situation in which the governmental action threatens to deprive the individual of his life.

Accordingly, this Court, in evaluating claims of right to procedural due process, has been scrupulously careful to identify the nature of the underlying substantive interests at stake in order to determine whether those interests were subsumed under either "liberty" or "property."

Perhaps the paradigm is *Board of Regents* v. *Roth*, 408 U.S. 564. Roth had been hired for an academic year by Wisconsin State University; the University declined to renew his contract and Roth brought suit, claiming that he was entitled to notice of charges and a hearing on the nonrenewal. The Court agreed with Roth that he possessed an "interest" in continued employment, in the sense that termination of employment is a "grievous loss." But that fact, the Court held, was not determinative of the due process question (408 U.S. at 570-571; emphasis in original):

> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. * * * We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

The Court then determined that Roth's interest in continued employment, *i.e.*, his desire to obtain a renewal of his contract, was neither a "liberty" nor a "property" interest, and therefore that he could be deprived of that interest without due process.

The *Roth* decision illustrates that although "grievous loss" may be a necessary prerequisite to the invocation of due process protections, it is not a sufficient one: the substantiality of an interest is not determinative of whether that interest is entitled to due process protection. Thus the fact that a prisoner's "interest" in being released on parole is concededly substantial cannot be dispositive of the due process claim in this case. To the contrary, as *Roth* further demonstrates, the evaluation of any due process claim must begin with an inquiry into whether the interest of which the individual may be deprived is a constitutionally cognizable liberty or property interest. See also *Arnett* v. *Kennedy*, 416 U.S. 134; *Goss* v. *Lopez*, 419 U.S. 565, 572-576. It is to that inquiry that we now turn.

B. Except To The Extent That He May Have A Legitimate Claim Of Entitlement Grounded In The Statutes, Regulations, Or Rules Governing The Terms Of His Confinement, A Prisoner Has No Constitutionally Cognizable Interest In Being Released On Parole

It may at first blush appear paradoxical to assert that a prisoner has no constitutionally cognizable "liberty" interest in being released from confinement on parole. This is so because the most elementary form of liberty, freedom from the state's physical control of the person, is at stake in the parole decision. But the question under the Constitution is whether an adverse parole decision "deprives" the prisoner of liberty. The answer, we believe, is that it does not.

A defendant who has been convicted of a crime, sentenced to imprisonment, and confined pursuant to that sentence has, in a very basic sense, lost his "lib-

erty" for the period of his sentence: the sentence of imprisonment lawfully places him under the physical control of the State for the period prescribed. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285. This is not necessarily to say that a prisoner retains no constitutionally cognizable liberty interests. Cf. *Procunier* v. *Martinez*, 416 U.S. 396. See generally *Wolff* v. *McDonnell*, 418 U.S. 539, 555-556. What we do contend here is that a prisoner has been lawfully deprived of his generalized constitutional liberty interest in freedom from confinement by his conviction and sentence.

This consideration distinguishes the denial of parole from its revocation. A prisoner's generalized liberty interest in freedom has been extinguished for the lawful term of confinement. Parole, once granted, revives that interest. Thus at a parole revocation proceeding, the parolee attempts to defend his liberty, albeit conditional, against those who would take it from him; an adverse determination ends the parolee's freedom and thus "deprives" him of "liberty" within the meaning of the Due Process Clause. *Morrissey* v. *Brewer*, 408 U.S. 471, 480-482. See also *Gagnon* v. *Scarpelli*, 411 U.S. 778. A prisoner seeking parole has no similar generalized "liberty" interest in the parole board's decision, for he is not at liberty and he does not stand to lose any liberty as a result of that decision. In short, the fact that a prisoner's

freedom is at stake does not, in and of itself, mean that a constitutionally protected liberty interest is at issue.

This Court's decision in *Wolff* v. *McDonnell*, *supra*, is not to the contrary. The question in *Wolff* was whether the protections of due process extend to prison disciplinary proceedings that may result in the reduction of a prisoner's statutory good-time credits. This Court held that the protections of due process do apply to such proceedings. But the Court's decision did not turn upon the mere fact that a reduction in good-time credits might affect the timing of the prisoner's release, *i.e.*, it did not turn upon a simple identification of release from prison with constitutionally protected liberty. Instead, the Court focused narrowly on the nature and source of the prisoner's interest in the retention of his accumulated good-time credits. Since that interest was created by statute, and by statute could be extinguished only "[i]n cases of flagrant or serious misconduct" (418 U.S. at 546), the Court determined that "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated" (418 U.S. at 557).

This approach, which would appear necessarily applicable here as well, avoids reference to or reliance upon the loose constellation of constitutionally based

values that underlie the analysis of claims of "liberty" interests in non-prisoner cases. See, *e.g.*, *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 572; *Meyer* v. *Nebraska*, 262 U.S. 390, 399. The Court's analysis in *Wolff* implicitly recognizes that such values do not, in the main, pertain to persons lawfully confined. A prisoner's interests relating to release are founded not in constitutional concepts of liberty but in the statutes, regulations, and rules that govern the terms of his confinement. In other words, except to the extent that those statutes, regulations, and rules create a positive right to release, a prisoner has no interest in obtaining an early release from confinement to which the procedural protections of due process can attach.

Accordingly, although a prisoner's interests in release from confinement may for purposes of convenience be called "liberty" interests, as in *Wolff*, they are in fact nothing more than "property" interests in disguise, *i.e.*, entitlements created by nonconstitutional sources of positive law.[12] As the decision in *Wolff* indicates, a prisoner's interests relating to release must be analyzed in "property" terms; the question in each case must be whether the State has extended to the prisoner a claim of entitlement that warrants procedural protection against unlawful divestment.

[12] Indeed, this may also be true with respect to a parolee's interest in retaining his freedom. In *Morrissey* v. *Brewer*, *supra*, a case that purportedly turned upon the parolee's "liberty" interest, the right of which the parolee would be deprived by wrongful revocation, was in fact a statutorily created "property" interest, *i.e.*, the entitlement to remain at large unless and until it was demonstrated that he had violated the terms of his parole.

In short, our position here is that, whatever the scope of Fourteenth Amendment "liberty" interests in other contexts, a prisoner's interest relating to release from confinement, to be constitutionally entitled to the procedural protections of due process, must rest upon a legitimate claim of entitlement grounded in the statutes, regulations, or rules governing the terms of his confinement. Thus the analysis to be applied here must be similar to that employed by this Court in recent decisions involving the assertion of property interests.

Those decisions make it clear that a constitutionally cognizable property interest arises only when the condition limiting the Executive's freedom of action exists in positive law and not merely in the hopes or expectations of the individual. This Court in *Roth* explicitly rejected the argument that such a property interest could arise merely from the individual's need, desire, or expectation (408 U.S. at 577):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement [illegible].

A legitimate claim of entitlement exists only when the State has bound itself, either by statute, regula-

tion, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts. So, for example, in *Goss* v. *Lopez*, *supra*, the student had a statutory right to attend school unless he was guilty of misconduct; in *Arnett* v. *Kennedy*, *supra*, the employee could be terminated only for cause; in *Perry* v. *Sindermann*, 408 U.S. 593, the teacher asserted a well-settled practice of reemployment absent "sufficient cause." See also *Mathews* v. *Eldridge*, No. 74-204, decided February 24, 1976, slip op. 10. Where the State has bound itself to extend or confer a benefit, or withhold a sanction, upon the determination of a particular set of facts, the Due Process Clause requires the implementation of procedures designed to ensure that the determination of those facts will be made fairly and accurately. Cf. *Richardson* v. *Perales*, 402 U.S. 389, 401-402.

On the other hand, where the State has not so bound itself, there can be no legitimate claim of entitlement. In *Board of Regents* v. *Roth*, for example, the University had discretion not to reemploy the teacher, and no set of facts he could prove would entitle him to reemployment. See also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886. When there is no determinable set of facts that could give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protec-

tions of due process are not implicated.[13] As Mr.

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[13] At least one court of appeals has rejected an argument similar to the one we have made here, holding that it "attempts to resurrect the now-discredited right-privilege dichotomy as an analytical approach to due process * * *." *Cardaropoli* v. *Norton*, 523 F.2d 990, 995, n. 11 (C.A. 2). Petitioner makes a similar contention (Br. 32). We submit that this characterization misconceives the thrust of our argument.

Under the right-privilege distinction, benefits created by substantive constitutional guarantees were "rights," and those created by statute were "privileges" subject to unfettered governmental control. A State could defend a claim that it had denied due process of law by answering that, because the State was not constitutionally required to give the benefit in question to *anyone*, plaintiff could not complain that he had not received it, no matter how arbitrary the State's decision and no matter what sort of discrimination the State may have practiced. Thus even entitlements founded on statutory guarantees were not enforceable in practice.

The question whether there is a "liberty" or "property" interest—an inquiry established by the Constitution itself—is quite different. This Court held in *Roth* that "property" interests are founded only upon statutes, rules, or settled course of practice. The question in a case of this sort, therefore, is whether any statute, rule, or practice has created for the prisoner a legitimate claim of entitlement contingent upon specific facts. If it has done so, the Due Process Clause applies even though the entitlement may be a "privilege" that could be revoked at any time by altering the rules that created the entitlement. For example, one deprived of welfare is protected by the Due Process Clause. *Goldberg* v. *Kelly*, 397 U.S. 254. And if a State provides that any individual who is "unemployed" shall be entitled to receive unemployment compensation, the expectation of benefits would be a property interest because benefits would be contingent upon provable facts. An applicant for unemployment benefits therefore would be entitled to due process of law. Cf. *Richardson* v. *Perales*, *supra*, 402 U.S. at 401-402 (application for Social Security benefits); *Geneva Towers Tenants Organization* v. *Federated Mortgage*

Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

C. Petitioner Has No Legitimate Claim Of Entitlement To Release On Parole

We turn, therefore, to an application of these principles to the facts of this case.

Kentucky law provides the Parole Board with discretion to grant or deny parole; the parole decision is to be made not on the basis of any objective facts, but on the basis of the predictions the Board may be able to make about the prisoner's ability to live peacefully in the larger society. Kentucky Rev. Stat. §§ 439.320, 439.330 and 439.340 (1973). See also Section 9 of the Kentucky Parole Board Regulations

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Investors, 504 F.2d 483, 495-496 (C.A. 9) (Hufstedler, J., dissenting); *Raper* v. *Lucey*, 488 F.2d 748 (C.A. 1) (application for a driver's license). (What process would be "due" in these cases would depend, of course, upon the balance between the interests of the individual and those of the government.)

Under our argument, the applicability of the Due Process Clause turns not upon the *source* of the rule arguably creating a claim of entitlement, or upon the label attached to the claim, but upon whether there *is* a legitimate claim of entitlement—that is, whether any rule of law provides that specific facts entitle an inmate to release prior to the expiration of his term of imprisonment. The right-privilege dichotomy depended upon the source of the rule in question; the inquiry into liberty or property looks to the nature of the entitlement created, and to whether there is a rule at all.

(Pet. Br. 5a-6a); *Harrison* v. *Robuck*, 508 S.W.2d 767 (Ky.). Cf. 18 U.S.C. 4203. The decision to grant or deny parole is a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 813 (1961). No particular fact or set of facts is determinative, nor could it be, for although facts are surely important to the parole release decision, the ultimate question involves an assessment of the prisoner's character.[14] There is no fact or set of facts that a prisoner can prove that will establish his entitlement to have the Board

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[14] Petitioner observes (Br. 27-28) that the federal Board of Parole's guidelines articulate some objective criteria that influence release decisions. These guidelines do not, however, diminish the Board's discretion. They indicate a convenient point of reference, a "normal" range of release times, but the Board is free at any time, and for any constitutionally permissible reason, to depart from these ranges. See 28 C.F.R. 2.18 (1975) ("[t]he granting of parole rests in the discretion of the Board of Parole. The Board may parole a prisoner who is otherwise eligible if (a) in the opinion of the Board such release is not incompatible with the welfare of society; (b) he has observed substantially the rules of the institution in which he is confined; and (c) there is a reasonable probability that he will live and remain at liberty without violating the laws (18 U.S.C. 4203(a))"); 28 C.F.R. 2.20(c) (1975) ("[t]hese time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered").

place trust in his character.[15] In short, no set of facts that petitioner could prove or attempt to prove would entitle him to parole.[16] Because the decision whether to grant parole is not determined by any particular controvertible facts, but instead is entrusted to the discretion of the Board, petitioner has no liberty or property interest in being released on parole.

We do not argue that no constitutionally protected interest is involved in any aspect of the parole process. Under Kentucky law, petitioner has a legitimate claim of entitlement to be considered for parole; the State guarantees to every prisoner a review and consideration of his case upon its merits. The State may not deprive a particular prisoner of that consideration without due process. But petitioner does not contend that he has been denied consideration for parole.

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[15] Petitioner's complaint demanded (App. 9) that respondents be ordered to promulgate "standards, norms or rules" that would delimit or remove respondents' discretion in deciding whom to release on parole. If as a result of such rules a prisoner would be entitled to release upon proof of specific facts, the prisoner would acquire a legitimate claim of entitlement. The Constitution does not require the promulgation of such rules, however. See *Board of Regents* v. *Roth, supra.* Only the Due Process Clause itself could be the source of a constitutional compulsion to promulgate such rules; but, as we have argued, that Clause does not apply to the parole process until, by creating rules, the State has established a "property" interest. Consequently, there is no warrant for compelling a State to promulgate restrictive substantive rules that would, in turn, trigger constitutional procedural protections. See also *Haymes* v. *Regan,* 525 F.2d 540 (C.A. 2).

[16] "It is well-established that the Board of Parole * * * has absolute discretion in parole matters." *Clay* v. *Henderson,* 524 F.2d 921, 924 (C.A. 5).

Moreover, the fact that petitioner was entitled to consideration does not, standing alone, entitle him to any particular procedures upon consideration. Neither statute, regulation, rule, nor course of practice establishes any more elaborate procedures upon consideration than petitioner's case was accorded. Petitioner therefore has no entitlement apart from the Due Process Clause to more elaborate procedures. And since the grant of parole upon consideration is a discretionary decision not turning upon provable facts, the Due Process Clause itself does not apply.[17]

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[17] The majority of the courts of appeals to consider the question have agreed with the court below that the Due Process Clause does not apply to applications for parole, at least in the absence of a statute or regulation creating an entitlement to parole subject to defeasance only upon certain facts. See *Scarpa* v. *United States Board of Parole,* 477 F.2d 278 (C.A. 5) (*en banc*), vacated as moot, 414 U.S. 809; *Mosley* v. *Ashby,* 459 F.2d 477 (C.A. 3); *Madden* v. *New Jersey State Parole Board,* 438 F.2d 1189 (C.A. 3); *Dorado* v. *Kerr,* 454 F.2d 892 (C.A. 9), certiorari denied, 409 U.S. 934; *Barnes* v. *United States,* 445 F.2d 260 (C.A. 8); *Schawartzberg* v. *United States Board of Parole,* 399 F.2d 297 (C.A. 10).

Four courts of appeals have held that the expectation of parole release is a "conditional liberty" that cannot be denied without procedural protections. *Bradford* v. *Weinstein,* 519 F.2d 728 (C.A. 4), vacated as moot, December 10, 1975, No. 74-1287; *United States ex rel. Richerson* v. *Wolff,* 525 F.2d 797 (C.A. 7); *Childs* v. *United States Board of Parole,* 511 F.2d 1270 (C.A.D.C.); *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole,* 500 F.2d 925 (C.A. 2), vacated as moot, 419 U.S. 1015. The First Circuit apparently has assumed that the expectation of parole is a liberty interest. See *Meachum* v. *Fano, supra.* Cf. *Grattan* v. *Sigler,* 525 F.2d 329 (C.A. 9) (Due Process Clause requires federal

We do not quarrel with petitioner's observation that prisoners subjectively may experience a "grievous loss" upon being denied parole. But the loss in question stems not from the deprivation of an entitlement, but rather from the disappointment of an expectation. The loss results not because the State's actions were unauthorized, but merely because those actions did not meet petitioner's unilateral expectations.[18] As the *Roth* decision teaches, such a loss does

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Board of Parole to provide a statement of reasons adequate under its own guidelines).

A closely related question is whether the setting of a tentative parole release date establishes a "liberty" interest so that hearings are required before the date can be altered. Compare *Sexton* v. *Wise*, 494 F.2d 1176 (C.A. 5) (no liberty interest until actual release date) and *McIntosh* v. *Woodward*, 514 F.2d 95 (C.A. 5) (same), with *Jackson* v. *Wise*, 390 F. Supp. 19 (C.D. Cal.) (setting of tentative release date creates a liberty interest).

[18] Petitioner argues that parole is now an accepted feature of our prisons, and that many prisoners are paroled (Br. 23-24, 32-33). Because eventual parole is the rule rather than the exception, the argument concludes, the prisoner's expectation of release is not "unilateral" but has real substance. The same argument was rejected by this Court in *Roth*; there, too, most teachers were rehired. The problem with the argument is that it does not explain how the fact that *most* teachers are rehired and that *most* prisoners eventually are paroled can be converted into a legitimate claim of entitlement for *this* teacher to be rehired or for *this* prisoner to be paroled. That conversion could be accomplished only through a set of rules of general applicability establishing substantive release criteria binding upon the decisionmaker—petitioner's complaint asserted, however (App. 3-4, 7), that the release criteria in Kentucky are "wholly subjective" and do not bind respondents to take particular actions in response to particular facts.

not amount to the deprivation of a constitutionally protected interest: the Constitution does not require that any particular procedures be used by the State before it acts to disappoint an individual's unilateral expectations.[19]

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[19] Indeed, in the last analysis this case is indistinguishable from *Roth*. Petitioner's argument, as bottom, appears to be: "Prisoners have a right to be considered for parole. Many prisoners are paroled. If my application for parole had been granted, I would have acquired a constitutionally protected interest in remaining at liberty, for under statute I could not be reimprisoned without due cause. Therefore I have a constitutionally protected interest in the possibility of receiving parole, and the parole board must comply with the requirements of due process before it denies my application." This argument appears identical to the one rejected in *Roth*. The teacher's argument there was: "Teachers have a right to be considered for employment in the next academic year. Many teachers are rehired. If my contract had been renewed, I would have had a constitutionally protected interest in my employment, because under the contract I could not be fired without due cause. Therefore I have a constitutionally protected interest in the possibility of renewal, and the university must comply with the requirements of due process before it decides not to renew my contract." The weakness in those arguments lies in the "therefore." The liberty or property interest arises only when the contract is renewed, only when the prisoner is granted parole. It does not arise before. The "therefore," which relates to the period before the protected interest arises, is merely a verbal bridge lacking any logical foundation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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